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ABSTRACT

Defining the role of the school district's attorney and selecting the proper individual to fill that role are the two major topics of this booklet. The first chapter, by Edgar H. Bittle, reviews the district counsel's range of responsibilities. Chapter 2, by Ralph D. Stern, focuses on the attorney's role in policy matters. In the third chapter, Stacie Rissman Joyce reports the perceptions of superintendents, school board chairmen, and school attorneys concerning the role of school attorneys in Minnesota from 1978 to 1980. Chapter 4, by William A. Anderson, examines the relative merits of retaining an outside law firm or hiring inhouse legal counsel. The Committee on Professional Responsibility of the National Association of Bond Lawyers prepared chapter 5's statement on the function and professional responsibilities of bond counsel. Chapter 6, by Bittle, and chapter 7, by Martin Semple, discuss ethical concerns and due process considerations affecting school board attorneys. Thirteen appendices offer guidelines for use when selecting attorneys, samples of school board policies on retaining attorneys, job descriptions, procedures for handling requests for legal services, a form for evaluating the performance of legal services, and a questionnaire for assessing the structure of a district's legal services. (PGD)

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THE SCHOOL ATTORNEY: A PRACTICAL GUIDE TO EMPLOYING SCHOOL DISTRICT LEGAL COUNSEL

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The National School Boards Association is a not-for-profit organization whose primary mission is the advancement of education through the unique American tradition of local citizen control of, and accountability for, the nation's public schools. In this way, education policy is decided by local school board members who are directly accountable to the community. NSBA promotes the quality of education through services to state school boards associations and local school districts. It represents school boards' interests in Washington, D.C., before Congress, federal education agencies, and other national regulatory bodies.

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National School Boards Association
Council of School Attorneys

THE SCHOOL ATTORNEY: A PRACTICAL GUIDE TO EMPLOYING SCHOOL DISTRICT LEGAL COUNSEL

Edgar H. Bittle
EDITOR
Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee
Des Moines, Iowa

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FOREWORD

In 1969 a group of lawyers discussed the need for an organization to bring together advocates for school boards and school administrators. Attorneys representing school boards generally did so on an ad hoc basis and often faced well-organized attorneys affiliated with national organizations in employment-related and civil rights-related litigation. Schools typically called a lawyer when they were in trouble and hoped they didn't have to see an attorney the rest of the time. The concept of preventative law, well-developed in the private sector, was not practiced by most school boards.

From its modest beginning in 1969, the Council of School has developed into a strong organization of over 1,800 lawyers from all over the country who represent school boards in the largest and smallest communities. In 1981, the Council initiated continuing education programs for school attorneys and since that time has provided the opportunity for two to four day seminars on specialized topics of school law. Additionally, the annual meeting of the Council, held concurrently with the National School Boards Association convention, has provided a valuable forum for attorneys to meet and discuss current issues. Attorneys participating in these programs have written and collected reference sources which have become valuable tools for every school attorney.

I was pleased to be invited to write a book for school board members and administrators on the role of the school attorney. I had written on that subject for the Iowa Association of School Boards and had spoken on that subject on two occasions at the NSBA convention. Over the years, I have also collected materials from attorneys around the country who have written or spoken on the same subject.

I quickly realized that there are several perspectives and probably as many opinions on the role of the school attorney as there are school board members, administrators, or school attorneys. After consulting with other school lawyers, I concluded that an anthology, presenting several points of view, would be most helpful to school board members.

Hopefully, this book will challenge and assist you in framing a role for the school attorney in your school district. One wonderful thing about public education is that local communities define the educational system by borrowing ideas from others and developing new methods to meet local needs. The intent of this publication is to provide food for thought which will lead to better risk management, loss control, and preventative legal work which will benefit public education.

January 10, 1986 — Edgar H. Bittle, Editor

EDITOR

Edgar H. Bittle is an authority on school law and public sector labor relations. He serves as counsel, chief negotiator or labor relations consultant for several districts in the State of Iowa. He has participated in numerous seminars for the Iowa Association of School Boards, as well as for the National School Boards Association, and served as chairman of the NSBA Council of School Attorneys in 1980-81. He currently serves as chairman of the Public Education Committee of the American Bar Association's Section of Urban, State and Local Government Law and is chairman of the Iowa State Bar Association's Administrative Law Committee.

Mr. Bittle is a partner in the law firm of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee in Des Moines, Iowa, and is general counsel for the Iowa Association of School Boards. He has served as counsel for the Des Moines Independent Community School District, the Ames Community School District, the Saydel Consolidated School District, and other school districts in Iowa. He was admitted to practice in Iowa in 1967 after receiving a B.A. from Cornell University in 1964 and his J.D. from the University of Michigan in 1967.

Mr. Bittle has authored: "The School Boards as the Impartial Tribunal," School Law Seminar Proceedings, NSBA, March, 1977; "The Fact-Finding Process in Iowa—Last Chance for Voluntary Settlement on the Road to Final Offer Binding Abitration," Broader Prospectives in Dispute Resolution, Society of Professionals in Dispute Resolution, 1978; "Problems of School Board Attorneys— Ethics and Due Process," School Law In Contemporary Society, NOLPE, 1980; "How to Conduct an Administrative Hearing," School Law for a New Decade, NOLPE, 1981.

CHAPTER 1

What to Expect of Your School Attorney*

by: Edgar H. Bittle
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Council of School Attorneys

School districts have become increasingly aware of their legal obligations and the legalistic society in which we all live. As part of that awareness, school districts have become more conscious of the need for a school attorney. However, many school districts have not worked with an attorney on a regular basis, and some districts work with an attorney only infrequently.

Questions are asked from time to time about what a school attorney can do for the school district. Essentially, the school attorney should provide the school board and the school administration with legal counsel and representation in the daily educational and business affairs of the school district.

Like preventive medicine, preventive law can be less expensive than major surgery, or litigation. The major areas in which the school attorney may be involved include constitutional law, torts (negligence, constitutional, or intentional acts of liability), review of contracts, bid specifications, assistance in the preparation of notices, litigation in the courts or before state administrative tribunals, assistance with employee dismissals, local government law (including zoning), labor law and negotiations, copyrights, condemnation, federal law, and dispute-settlement negotiations.

The various states may have specific legal authority regarding employment of legal counsel. The following discussion is an historical summary of the development of the role of legal counsel particularly in states where specific statutory authority to hire legal counsel does not exist.

> It may be broadly stated that a school district having power to sue and be sued may employ an attorney for the protection of the public interests committed to it.[1]

> The question of what power a school district or board has to employ counsel has arisen most frequently, as might be expected, where no express statutory authority was conferred, and in such cases, while the decisions depend largely upon local statutes, the courts, . . . have found or recognized generally that a school district or

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* Adapted from "The Role of the School Board Attorney," Iowa Assocation of School Boards' *DIALOGUE*, May-June, 1975.

[1] 47 Am. Jur. 309, *Schools*, §15.

board, for purposes within its functions or under certain circumstances, has implied power to employ counsel, at least in the absence of an express statutory prohibition against such employment.

In a number of instances the courts have reasoned in substance that this implied power existed as a necessary incident to the statutory powers of a school district or board as a separate corporate entity, particularly where the district had the express capacity to sue and be sued and to enter into contracts.[2]

In many states, judicial interpretation has provided the foundation in the development of the role of school legal counsel. A brief summary of two cases provides the basis for a better understanding of the courts' view that legal advice is vital in all litigation involving a school district.

In *Lindquist v. Abbett*,[3] an attorney (Mr. Spear) had done all the legal work for the school district for a period of years. The practice was to pay him at the rate of $350.00 per month or $4,200.00 yearly. In 1910, the Attorney General's office ruled that a school district could not hire an attorney by the year. On appeal to the Supreme Court, the Minnesota Supreme Court stated:

Coming now to the main question whether the board had the power to employ an attorney in the manner followed in retaining Mr. Spear, enumeration of the expressly granted powers of the district is unnecessary. It is sufficient that for the most part they are general and highly important, their weight upon the responsible officials increasing in proportion to the school population and educational activities involved. They include the power to acquire and dispose of both real and personal property. Rooms for school purposes may be leased. (citation omitted) Although otherwise and necessarily implied, the right to "prosecute and defend actions by or against the district" is expressly given the board. (citation omitted) That probably explains why the power generally to employ an attorney is conceded, as it must be. Power to employ established, it is difficult to negative the right to make any reasonable contract with an attorney for his services. Given the power to employ, how comes it that the manner of employment is restricted?

The power comes from the statute, which is silent as to the manner of its exercise. It must follow then, and we so hold, that the terms of employment are left to the discretion of the school board. That discretion being executive, its exercise is not subject to review generally by the judiciary. There may arise cases where its exercise, when challenged in appropriate litigation, will appear to have been in bad faith, or so unreasonable as to be arbitrary and capricious, and, hence, beyond the power granted. It will be time enough to consider such an issue when it is presented. It is not here.

The board of directors of any private corporation of the magnitude, importance, and pervasive contacts which characterize the Duluth school district would, as matter of business sense and safe administration, require the services of counsel. The usual thing would happen. The executive head would select some lawyer having the confidence of the management and retain him upon an annual basis. If a firm were chosen, probably the understanding would be that some one member of it would be assigned to be individually responsible for the prompt and satisfactory handling of all matters of the corporation submitted to him. Business men are averse to being shunted from one lawyer to another simply to suit the convenience of others. Their desire is for some one adviser to whom they can go when occasion arises and get prompt and dependable answers to their questions. They want advice backed not only by knowledge of the law, but also by experience with the other

[2] 75 A.L.R.2d 1345.

[3] 196 Minn. 233, 265 N.W. 54 (1936).

"non-legal" factors so often present in the problems submitted by businessmen to their lawyers.

The evidence makes it appear that the hypothetical case of the private corporation indicates the precise status in which the members of the defendant board found themselves when they first retained Mr. Spear. It is beyond our competence to find in their attitude and action anything surprising, to say nothing of such elements of arbitrary or capricious action as to indicate that they went beyond their lawful power. We cannot find anything illegal in the manner of Mr. Spear's employment and payment. We cannot agree in the distinction made below between what were supposed to be his "legal" and "non-legal" services. Once a lawyer becomes familiar with the affairs of an important and continuing client, he is constantly advising on matters which may involve both questions of law and fact. Many courses of action which are legal are unwise. The lawyer who in vouching for their legality does not at the same time point out their lack of wisdom, if it be known to him, is an incompetent adviser. In so counseling, he does not by so much cease to be a legal counselor. His knowledge of the law is not the only thing wanted. Frequently more important is his knowledge, gained from experience, of how the law works in application to the affairs of men. In some cases, corporations desire their counsel to become specialists in their affairs. It is probable that the defendant board deliberately tried to make Mr. Spear a specialist in the affairs of the Duluth school district. If so, they were but following an approved practice of well-managed, private business. There is no law which condemns them for so doing simply because they happen to be managing a school district.

Apparently, it was considered to be Mr. Spear's duty, anyway it was his custom, to be present at every board meeting. The members wanted to be sure of the legality of their action as they went along and were attempting to avoid the delay which often ensues if a matter must wait until it can be referred to absent counsel and his opinion procured. Then there is often a choice, already mentioned, to be made between two or more routes of action, all of which may be legal, but one altogether the more desirable for some reason only an experienced lawyer may know. So the criticism of Mr. Spear's presence at all board meeting is baseless. No one has yet condemned the municipal practice that requires the city or village attorney's presence at meetings of the council. That custom is no more to be condemned in the case of defendant board. It is charged with public affairs more weighty and complex than those of most cities of the state.[4]

In some states the county attorney has designated responsibility to provide legal services to school districts. In *Rural Ind. Sch. Dist. v. Daly*,[5] the Iowa Supreme Court considered such a statute and concluded that the district had power to hire its own counsel in district dissolution proceedings. The court declared:

A school district is a corporation. It is a legal entity, with power to sue and be sued, to hold property, and to exercise all powers in all school matters pertaining to said corporation within its territory.

* * *

It is further provided that the president of the board of directors shall appear on behalf of his corporation in all actions brought by or against it, unless individually a party, in which case the duty devolves upon the secretary. Section 4304, Code of 1924.

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[4] 265 N.W. at 56-57.

[5] 201 Iowa 286, 207 N.W. 124 (1926).

"In all cases where actions may be instituted by or against any school officer * * * the board may employ counsel, for which the school corporation shall be liable." (citation omitted)

It is apparent that the purpose of the statute supra is to enumerate one of the duties of the president, and to provide that a school board may employ counsel at the expense of the corporation, even in an action brought against a school officer individually.

One of the duties of a county attorney prescribed by statute is to furnish, free of charge, legal advice to all school board and township officers when requested so to do by such board or officer. (citation omitted) This provision simply defines one of the duties of a county attorney, but the law does not make it mandatory upon a school board or officer to employ the county attorney.

* * *

This appeal involves the right of a school corporation to employ the services of an attorney when its corporate right to exist is in jeopardy. In such a case, must the authority to contract for legal services be found in the express terms of the statute, or is this power an incident to corporate existence, and relevant to the many powers directly granted by statute? We are of the opinion that such authority impliedly exists, and under the circumstances of this case it would be unreasonable to deny such incidental and implied power to a corporation, taking into consideration its character and the interests involved. Discretion in this particular must be conceded, unless the charter of its being forbids, or the general scheme of its government provides for an attorney or legal officer, as to negative authority to employ others.[6]

The role of the school attorney should be that of legal advisor, not policy-maker. The attorney will prepare and render legal opinions on the request of the superintendent, the staff, the board of education or a member of the board. In rendering advice and in assessing the legality of alternatives, the attorney may help the policy-making process by defining legal problems. However, it is the administration which recommends and the board which adopts policies of the school district.

More and more, school board members deal with complex areas of law. The Family Educational Rights and Privacy Act, the discrimination laws, the handicapped laws, collective bargaining and board liability in the areas of student discipline or employee dismissal, illustrate this.

In order to function effectively, board members and administrators need access to legal counsel. This does not mean decisions cannot be made without the attorney; rather, effective use of legal counsel as part of the management team has become a part of the job of administrators and board members.

Which people have access to the school attorney should be defined by the board in cooperation with the superintendent, keeping in mind that it is far better to have legal advice in advance than to seek legal advice too late and perhaps end up in costly litigation.

In the organizational structure of the school district, the attorney is counsel to the board and the superintendent. In all matters except disputes with the superintendent, the attorney should report to the board through its chief executive officer, the superintendent.

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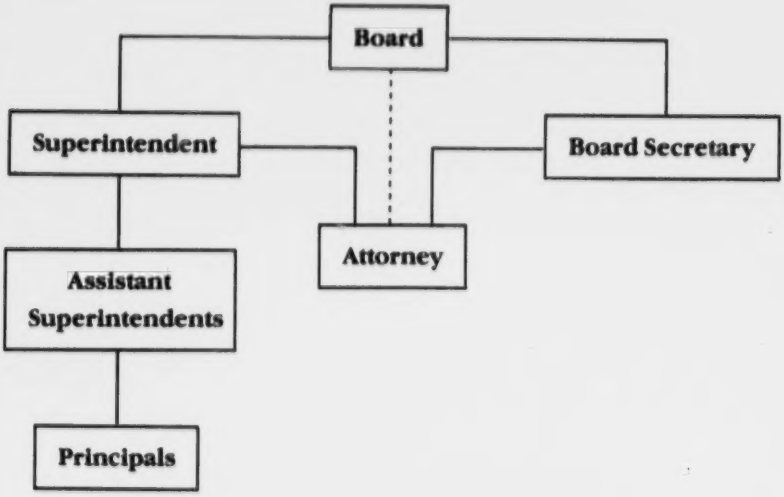
[6] 201 Iowa at 289-291.



Informal access to the school attorney should be frequent. However, the number of persons who may have access or request a written opinion of the school attorney may be limited. A procedure should be developed whereby persons other than the board member or superintendent may request a written opinion. In some districts, only the superintendent or the president of the board are authorized to seek written opinions from the school attorney. The board may require that all opinions be addressed to the superintendent or designated administrators and that any opinion to a board member be addressed to the board secretary and be available to all board members.

A school district should have its attorney review specificatons for biddings, notices to be published, and contracts for goods and services and real estate transactions so that the board and the administration are fully aware of the elements of the documents. By having legal counsel examine contracts and specifications the board may avoid provisions which might compromise the best interest of the school district.

Most boards do not have the attorney prepare or assist in the preparation of school board minutes except in the case of bond issues. However, it is good practice to have the school attorney review the minutes before they are published or approved so the attorney may point out any possible legal ramifications which could be avoided by correction. Likewise, it may be well to have the school attorney review the agenda and the items to be considered on the agenda prior to the board meeting so the attorney can be aware in advance of the meeting the possible legal questions which may be raised at the meeting.

Generally, the attorney is retained on an hourly basis. It is important that the board and the attorney have a clear understanding of the precise legal service to be rendered and the compensation arrangement in advance to avoid problems and misunderstandings in the relationship.

Irving C. Evers, an experienced school attorney for several New Jersey school districts and past president of the National Organization on Legal Problems of Education, has suggested the following criteria for the school attorney:[7]

[7] Irving C. Evers, "The School Board and Its Attorney," *School Board Notes* 33, New Jersey State Federation of District Boards of Education, May 1968.

1. Does the attorney have a genuine interest in the cause of education?
2. Does the attorney have an intimate knowledge of the provisions of the education laws of the state?
3. Is the attorney familiar with the interpretations of those laws set forth in the decisions of the courts and other administrative agencies which affect education?
4. Is the attorney familiar with the rules and regulations of the state board of public instruction?
5. Is the attorney knowledgeable in the preparation of contract documents, specifications, notices to bidders and bidding procedures?
6. Does the attorney have a familiarity with public law generally since the board of education is subject not only to the provisions of the the education law but also to those of other public laws as well?
7. Is the attorney knowledgeable in the field of administrative law since such procedures are applicable to boards of education?
8. Does the attorney have experience as a trial and appellate lawyer or an association with one because there will be a need to represent the board in litigation and in hearings?
9. With the tremendous increase in demands being made by teachers, is the attorney prepared to participate in negotiations, able to draft agreements with teachers, and qualified to participate in arbitration hearings?
10. Is the attorney active in organizations which specialize in the study of school law such as the State Council of School Board Attorneys, the National Organization on Legal Problems of Education, and the Council of School Attorneys of the National School Boards Association?
11. Does the attorney maintain a close personal association with other school board attorneys to benefit by the constant interchange of ideas which can only benefit the board?
12. Does the attorney keep abreast of proposed legislation and changes in existing legislation?
13. Does the attorney keep the board informed of the effects of important decisions of the courts and decisions of other administrative agencies which affect education?
14. When called upon to render decisions, are the decisions based upon the attorney's understanding of the law and not tailored to meet the desires of the board or any member thereof?
15. If the attorney becomes aware of practices by the board which are not consistent with the law, does the attorney diplomatically call upon the board to cease and desist from such practices without regard to whose toes may be stepped on?
16. Although the attorney should not attempt to formulate policy, if board policy is discovered to be contrary to law, does the attorney so advise the board and recommend proper legal policy?

17. Is the attorney familiar with the principles of parliamentary law frequently called into play during the course of board meeting?

18. Does the attorney know when to advise a board to stop public discussion in certain areas and to recommend discussion in executive sessions in areas that are sensitive and that could lead to trouble?

19. Does the attorney maintain close liaison with the board secretary or school business administrator and with the administrators in order to be aware of what is going on in the system?

20. Does the attorney make such recommendations that will lead to smoother and more efficient operation of the school system from a legal point of view?

The foregoing list is not a complete list and not every attorney should be expected to fulfill all the criteria. In some instances, several members of a law firm may perform specialized services with coordination of the legal affairs of the district by one lead attorney.

Appendix L is an evaluation instrument developed by administrators in the Des Moines Independent Community School District for consideration by its board. Periodic evaluation of legal counsel by the board and administration will assure good communication with legal counsel and improve delivery of legal services.

A school board should be cautioned against using a board member as legal counsel to the school district. The school board member who is coincidentally an attorney was not elected to serve as the school attorney but to serve as a member of the board. As a member of the board, the board member-attorney sets the policy for the school district. A board member should not determine the legality of one course of action over the other, and the board member (coincidentally an attorney) should not be put in the position of determining legality and then setting policy. If there is a question about the legality of one course of action over another, then the school attorney's opinion should be sought. After the school attorney has defined the legal guidelines, then the board can make the policy decisions within those guidelines. Do not put a board member who is also an attorney in the position of giving legal advice lest his effectiveness as a policy-maker board member be compromised. In addition, it may be a conflict of interest for a board member attorney or the board member attorney's law firm to serve as legal counsel and receive compensation.

Board members should avoid "using" the attorney to prove a point or to make an argument. While such tactics may help win a "battle" it can ultimately "lose a war" in that the effectiveness of legal counsel (or any administrator) who is "used" this way will ultimately be diminished.

The school board should develop procedures for requesting services and a general job description for legal counsel. Appendices J & K illustrate a definition of the attorney-client relationship, while Appendices E through I describe the functions of school attorneys in several different jurisdictions.

In summary, the attorney's best service to the school district may be keeping the school district out of legal difficulties. The courts have ruled that a school board's failure to consult an attorney and their ignorance of the law regarding due process procedures required by the U.S. Constitution is no defense to avoid

liability. If the district does not call the attorney until the problem exists, it may be too late, or the problem may have progressed to a point where options for solution are exceedingly slim and solutions are costly to the district.

CHAPTER 2

The Role Of The School Attorney In Policy Matters*

by: Ralph D. Stern
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Palo Alto, California
Past Chairman, National School Boards Association
Council of School Attorneys
Formerly General Counsel, San Diego Unified
School District

Lawyers, by professional training and practical experience, recognize the uncertainty of that which others assume is clearly defined. The inexperienced client assumes that the law—that is, the answer—is to be found in some book to which only a lawyer has access. Only after gaining experience in using the services of an attorney does the client recognize that much of the value of those services lies in the attorney's ability to point out the possible consequences of alternative courses of action. Lawyers cannot guarantee their advise.

It is this ability to function in the absence of absolutes that allows school attorneys to advise concerning policy; to carry out policy; and, under certain circumstances, to make policy.[1]

Advising on policy occurs whenever a school board's attorney renders an opinion to the board. The request for an opinion may arise in the context of "Can we . . . ?"; "How can we . . . ?"; "What can we . . . ?"; or "Should we . . . ?". Regardless of whether the attorney has been asked a specific "yes or no" question or to explore the alternatives, the attorney is assisting in the formulation of policy.

The role of the school attorney in carrying out policy is most apparent when representing the school board in adversary proceedings—particularly those in which the board is the plaintiff—or when an action of the board is being challenged by an allegedly aggrieved party.

Those instances in which the school attorney actually makes policy appear in less sharp relief and are far less frequent than when the attorney advises on or

* Adapted from presentations at the National School Boards Association Council Of School Attorneys Meeting, Miami Beach, Florida, April 18, 1975; and the NSBA Convention, San Francisco, California, April 19-22, 1980.

[1] Everybody knows what "policy" is—at least in the abstract. Problems arise only when one seeks to determine whether a particular matter is a "policy question." On this occasion the author has followed the ancient judicial practice of not reaching the question on the grounds that a definition of policy is not essential to the disposition of the issues before us.

carries out policy. Sometimes the school attorney must make on-the-spot policy decisions when involved in litigation or negotiation. In such instances it is incumbent upon the attorney to know the client's general position, goals, and interests.

It is much more difficult to deal with the subtle involvement in policy determinations that arises naturally from being present and being close to the board members, the superintendent, and other senior staff members. The matter is complicated by the fact that in any large organization there are currents, cross-currents, and, perhaps, whirlpools. Thus, the expression of an opinion by the school district's attorney on an issue will be appreciated by those who concur with the opinion expressed and resented by those who disagree. Skilled players of the bureaucratic game have an amazing ability to mention casually an issue, solicit the attorney's views, and then state that the matter has been reviewed with the school district's attorney who is said to completely agree with the position advocated.

The tendency to find ways to bring the school district's attorney in on one side or the other of an issue is encouraged by the fact that the attorney—despite the Gallop Poll—often has a high degree of credibility among board members, with the superintendent, and with the community. First, the attorney is not a professional educator. Thus when professional educators disagree, the side that has the attorney's agreement says, "Look, even this intelligent, well-educated, impartial pillar of the community agrees with us. He must be right." Of course, the other camp counters with, "What the hell does he know? He has never been a teacher, a counselor, a vice-principal, a principal, a coordinator, a director or done anything that would give him insight into the problems educators face."

In a somewhat different context, it has been said that seduction can be sweet. It is indeed seductive—not to mention ego satisfying—to be asked to express opinions on a wide variety of subjects. Nevertheless, there are numerous occasions when refraining from expression of an opinion is the wiser course of action. For these reasons, counsel for a school district makes frequent use of such phrases as, "On the other hand," "It can also be argued," "Reasonable people could come to either conclusion," and "Have you talked to _____about this?"

Of course, in many areas the rendering of appropriate legal advice cannot be separated from advising on policy matters. Justice Powell in his dissent in *Wood v. Strickland*,[2] gives one example when he suggests that reliance by school board members on the advice of counsel on questions involving the constitutional rights of students, is evidence of good faith sufficient to avoid the imposition of personal liability for violations of the Civils Rights Acts. An assessment of the legal risks in connection with alternative courses of action can also often involve the attorney in policy decisions. No attorney can expect to retain clients if that attorney is a naysayer rather than solution-minded. A negative mindset is inconsistent with the role of legal counsel for a public agency. As J. P. Morgan said, "I don't want a lawyer to tell me what I cannot do; I hired him to tell me how to do what I want to do."

Any discussion of the role of school district legal counsel in policy matters must answer the question, "Who is the client?" The longer counsel is employed by a school district the murkier are the origins of his or her employment. The membership on boards of education changes; superintendents may either come

[2] 420 U.S. 308 (1975).

and go, or stay for long periods of time, resulting in the establishment of close relationships.

When relationships between the board and the superintendent are good, the question of whether the board or the superintendent is the client does not arise. However, it is during such a period that events may occur that will lead to problems in the future. For example, the board may direct the attorney to work with the superintendent in revising the superintendent's employment agreement. The superintendent naturally, expects an agreement to be drawn which will provide the superintendent with the maximum protection. Very likely the board has not given the question much thought. Some time later, if there has been a falling-out between the board and the superintendent, the question may arise as to the attorney's role in interpreting the contract which was drafted in a completely different climate.

The question, "Who is the client?" can arise in other contexts as well. For example, assume that a district has a contract with its employee unions that provides for advisory arbitration with the final decision on all grievances to be made by the governing board. The employee will have an attorney furnished by the union. In the hearing before the board, does the school district's attorney represent the superintendent or other administrator or does the attorney advise the board? Is it a conflict of interest for the attorney to do both? The superintendent or other administrator may not be pleased at the prospect of being unrepresented in the proceeding. This is particularly true if the union attorney seeks to turn the proceedings into a trial of the responsible administrator. Although some recent cases have approved school district attorneys serving both as prosecutors and advisers to the governing board, it is not a comfortable position in which to find oneself.

There are obviously no neat solutions to these problems. When relations between the board and the superintendent are cordial, the attorney's problems are minimal. When that relationship is somewhat strained, but short of being hostile, the situation requires considerably more adroitness. Under these circumstances, the best advice to school attorneys may well be to say as little as possible. When the ultimate break between the board and the superintendent comes, it is clear that the attorney's allegiance belongs to the majority of the board.

No discussion of the role of the school attorney in policy matters is complete without devoting some attention to the reluctance of many school districts to make full use of legal counsel. This reluctance may be attributable to a number of commonly held misconceptions which may be summarized as follows:

Misconception Number 1: Lawyers will usurp the responsibilities and authority of governing boards and administrators.

The sophisticated governing board and the effective superintendent recognize that the services provided by an attorney enable both of them to perform more effectively their respective functions. The attorney for a school district knows that while he or she serves both the board and the superintendent, the superintendent is the chief executive officer of the board and the chief administrative officer of the district. The attorney for a school district also learns to deal with the timid, cross-pressured board member or administrator who wants to avoid difficult decisions by having the school district's lawyer foreclose all options save one.

Misconception Number 2: Lawyers impede administrators by consistently advising that the administrator's proposed action is illegal.

No attorney can expect to retain clients if he or she is a naysayer rather than solution-oriented. A negative mind-set is inconsistent with the role of legal counsel for a public agency. The attorney's job is to tell the client how it may accomplish its objectives. The more familiar the lawyer is with the client's problems and goals, the more aware he or she is of the client's various commitments; the more the lawyer knows of what has transpired in the past and what is to come in the future, the greater the ability to present alternative courses of action.

It is this same familiarity with the client which permits a school district lawyer to make the most important contribution; that is, to practice preventive law. The attorney provides no more valuable service to the client than pointing out today's mole hills before they become tomorrow's mountains.

Misconception Number 3: Day-to-day legal advice is unnecessary since an attorney will be provided when trouble arises.

Much has changed in the last 10 to 15 years. The actions of school boards and school administrators are being challenged at every turn. This challenge comes from students, parents, employees and their representatives, and other governmental agencies. For example, one out of every eight bills introduced in the California State Legislature pertains to education. The actions of the federal government are also having a greater effect on local school districts. Consider, just as examples, the Family Educational Rights and Privacy Act, Title IX regulations pertaining to sex discrimination, the possibility of federal collective bargaining legislation, and the Supreme Court decision in *Goss v. Lopez*[3] and *Wood v. Strickland*.[4] It is apparent that in order to do an effective job the school board member and school administrator of today need ready access to legal counsel. This does not mean that they need to check with their attorney every time they have to have to make a decision; rather, that learning to use legal counsel effectively has become a part of their job.

Misconception Number 4: No one without classroom experience can understand the problems of educators.

Surprising as it may be, vestiges of this parochial view still remain. Public education is a vital part of government and there is a need for specialists of all kinds. The effectiveness of school board members and administrators may well be directly related to how successfully they use the services of professionals such as architects, accountants, lawyers and others who can help them do their job better.

Lawyers are trained to focus on a problem, apply their skills to a solution of that problem, and then move on to the next problem. Of course, as previously noted, the more familiar an attorney is with a client—with its past and present problems, its personnel, its internal structure—the better contribution which can be made.

Misconception Number 5: Lawyers are expensive.

While the cost effectiveness of timely legal counsel cannot be measured with precision, school districts often pay a heavy price as a result of waiting until crisis

[3] 419 U.S. 565 (1975).

[4] 420 U.S. 308 (1975).

arises before consulting with a lawyer. They need a lawyer who can anticipate their problems, suggest alternative ways of accomplishing objectives, be readily accessible to a broad range of staff, develop good working relationships with key personnel, and be fully committed to the district's interests.

One of the more troubling questions for school board members and superintendents is to decide the most desirable method of providing legal services for a school district. The principal options are either to employ house counsel or to retain an outside law firm. Each has advantages and disadvantages and must be considered in light of each district's unique circumstances and requirements. High quality legal assistance can be provided through either approach; a board should not change from one method to the other merely for the sake of change.

CHAPTER 3

The School District Attorney: Trends of Legal Involvement in Education*

by: Stacie Rissmann Joyce, Ph.D.
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Most school administrators have, at one time or another during the course of their careers, been threatened with litigation. As many also know, some of those threats become reality. For most educators, the usual reaction is to get in touch with the school attorney. However, does every school district have an attorney? How often is that attorney contacted and for what reason? What kind of continuing or consulting relationship exists between the attorney and the school district? How is the attorney hired and under what type of contract? Specifically, what is the attorney's role in a school district?

HISTORICAL SETTING

The power of school boards to employee attorneys has been an issue in several states for many years. In Minnesota, for example, the Attorney General ruled in 1929[1] that school districts had the implied power to employ an attorney. Subsequent acts of the Minnesota legislature[2] and the state supreme court[3] have sustained this opinion. The State Department of Education and the assistant to the Attorney General do not give legal advice nor represent public school districts in Minnesota.

The threshold decision in a Texas case illustrates the contemporary and adverse problems faced by school boards having no legal precedence. The court said:

> Public officials are presumed to do their duty, and where as here a board of laymen sought a legal opinion from a reputable lawyer as to their duties under the circumstances, and then followed that legal opinion, they have not acted willfully and corruptly.[4]

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* Extracted from doctorate thesis entitled "The Role of the School Attorney in Minnesota". Reprinted with permission, *Nolpe School Law Journal*, Vol. 10 #2, 1982.

[1] 215 Op. Att'y Gen. 348, 140-C-9 (April 16, 1929).

[2] Minn. Stat. § 123.19(3.5); § 123.51(1).

[3] Lindquist v. Abbett, 196 Minn. 223, 265 N.W. 54 (1936).

[4] Reyna v. State, 319 S.W.2d 28, 30-31 (Tex. Civ. App. 1958), *aff'd*, 160 Tex. 404, 333 S.W.2d 832 (Tex. 1960).

Legal representation of school boards is essential to secure favorable court decisions, for interpretation of the law, and for the protection of legal rights of boards in providing an education system to meet the needs of the community.

Beginning in 1954 with the landmark school racial desegregation case of *Brown v. Board of Education*,[5] a noticeable change in the court's and public's attitude toward public education began. This turn-about was conditioned by five basic factors: (1) increased importance of education; (2) expanded subject matter of which the courts will take cognizance; (3) increasing proclivity to resort to the courts; (4) efficient mass communication media; and (5) inabililty of legislative bodies to provide all of the solutions to the problems of the times.

Consequently, as Thomas Shannon points out, "a significant number of lawsuits filed in the United States against public schools today primarily seek to establish new law. These lawsuits are designed to put the judiciary in the position of creating new legal rights affecting public education which state and local legislative bodies will have no choice but to honor."[6]

In addition to the court's reactions to public education, plaintiffs' once complacent attitudes and docile actions have also changed since writers such as Lemmel[7] and Roesch[8] minimized the necessity of employing private attorneys. In seeking to establish a prima facie case against a school district, the plaintiff may employ tactics such as: (1) press conferences designed to focus attention on the plaintiff's theory of the case; (2) political pressures on school board members to settle out of court; (3) demands for general and punitive damages; (4) expansion of the class action concept; (5) vigorous and uncompromising legal advocacy by legal groups litigating law reform issues; and (6) more extensive representation of public school employee organization members.[9]

It is easily seen that the nature of the problems encountered by the school attorney requires a high degree of technical competency and an appreciation of public education. It is a difficult role. A study of the employment of school attorneys, services provided, administrative relationships and description of the attorney by size of district classifications could be an essential administrative resource for public schools.

Such information was compiled in a study conducted to analyze the role of the school attorney in the state of Minnesota. The design included a comparison of the superintendent's and the board chairmen's expectations with the school attorney's perceptions of the attorney's role during the school years of 1978-79 and 1979-80. The major research questions were: (1) What is the role of the school attorney in the decision-making process in school districts in the state of Minnesota? and (2) Does the school attorney's role differ depending on school district enrollment size?

DESIGN OF THE STUDY

The major portion of the study focused on an instrument called the Perception/Expectation Inventory. It contained fifty-three items listed under nine sub-

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[5] 347 U.S. 483 (1954).

[6] T. Shannon, *The New Tactics Used by Plaintiffs in Imposing Their Views on, or Enforcing Their Rights Against Public School Boards*, Speech presented at National School Boards Association Council of School Attorneys 31st Annual Convention, Philadelphia, Pennsylvania (April 2, 1971).

[7] Lemmel, *Employing Legal Services*, 99 A. Sch. Bd. J. 54 (Dec. 1939).

[8] Roesch, *Are School Attorneys Necessary?*, 57 Nation's Schools 58-60 (May 1956).

[9] *See* note 6, *supra*.

ject areas: (1) district business/communication; (2) board procedures; (3) buildings and grounds; (4) pubic school/private school contacts; (5) curriculum; (6) desegregation; (7) finance; (8) personnel; and (9) students. The inventory was developed to be used by superintendents, attorneys, and board chairmen to quickly assess the amount of responsibility and the frequency of involvement of the attorney. Each respondent was asked to rate each item on the Perception/Expectation Inventory for amount of involvement using the following scale:

5. School attorney was involved *24 or more times* during the school years of 1978-79 and 1979-80.
4. School attorney was involved *16-23 times* during the school years of 1978-79 and 1979-80.
3. School attorney was involved *8-15 times* during the school years of 1978-79 and 1979-80.
2. School attorney was involved *1-7 times* during the school years of 1978-79 and 1979-80.
1. School attorney was *not* involved.

Each respondent was asked to rate the responsibility response column by the following scale:

5. Task/decision was *entirely* the responsibility of the school attorney.
4. Task/decision was *largely* the responsibility of the school attorney.
3. Task/decision was a *shared* responsibility of the school attorney and a school official.
2. Task/decision was *little* responsibility of the school attorney.
1. Task/decision was *not* a responsibility of the school attorney, or is *not applicable*.

A Background Information Sheet sent only to superintendents and attorneys provided additional data. Factors such as: amount of money spent for legal services, employment process of attorneys, attorneys' educational background and qualifications, number of years the attorney has represented the district, residency of the representative attorney, method of pay, method of delivery of legal services, the district's first source for legal advice, and communication process between the attorney and district were compiled by means of this instrument.

After identifying the attorneys or law firms who were regularly consulted by superintendents, a chart was formed. The chart had four school enrollment division columns with headings: 01-400; 401-750; 751-1500; and 1501-50,000 students. These divisions were determined by listing all Minnesota school districts in rank order of school enrollment, then dividing that list by four.

Responses indicated that many attorneys or law firms were employed by more than one school district. Elimination of districts from the chart was done so that each attorney or law firm would only have to address the response for one specific school district.

The attorneys or law firms and school board chairmen of these respective school districts remaining on the chart were then contacted. They were asked to complete a Background Information Sheet and the Perception/Expectation Inventory.

FINDINGS: SCHOOL DISTRICT INFORMATION

A descriptive overview of the majority response findings pertaining to district practices is shown in Table 1.

The data show a highly significant relationship between the size of the school district and its most frequent source for legal information. The smaller school districts consult the Minnesota School Boards Association; however, the larger districts (those with over 1500 students) consult their school attorneys first. Possibly larger school districts have more money available for legal fees than the others, and there is a larger pool of attorneys from which to consult.

Regardless of the legal issue, only the largest districts regularly consult the same attorney. The employment process of the school attorney becomes more formal as the district enrollment size increases. Unmistakably, the boards in the larger school district are taking an active part in the selection of their school attorneys in contrast with the other sizes of districts. In 64.3 percent of the school districts responding, the school board contacted, formally interviewed, and employed the school attorney.

In smaller districts, however, the superintendent usually contacted an attorney of his or her choice to employ for the district. In many districts an attorney was employed because of continuation of service or referral. In other words, his father was the attorney; now his son has the practice. (The study revealed that 100 percent of responding Minnesota school attorneys were male).

The employment agreement is a verbal one in smaller districts but generally requires a board resolution in districts having more than 750 students.

The majority of school districts do not have written policies for the attorney, nor is there a description of the attorney's functions in small districts; however, they are vaguely described in larger districts.

The majority of the responding attorneys, 73.7 percent, indicated that they are paid on a fee basis according to hours worked as opposed to a retainer or annual contract. Understandably, the mean amount of money spent for legal fees increased with district size.

The most frequent source of direction and information is the superintendent regardless of the school district size. Thus, the results indicate that the superintendent works most closely with the attorney, in spite of the fact that in the majority of the responses the attorney was hired by the board.

FINDINGS: ROLE OF THE ATTORNEY

It was found that only in smallest school districts do the majority of school attorneys reside outside of their representative school district boundaries. As the distance between the school attorney's office and the representative school district may affect the attorney's delivery of service, attorneys were questioned about their method of delivery of service. In spite of the low mileage between the attorneys' offices and school districts (2.5 miles was smallest distance), the majority reported that they generally service districts by telephone. The least frequent method of service was that of the personal visit. Letters or memos are sent in 21.4 percent of the time; 12.5 percent of the attorneys' responses indicated a mixture of such methods as phone calls and letters.

Responses also revealed that the attorneys have all represented a school district for a number of years and, other than seminars, no special courses or qualifications were listed for the attorneys' educational background. Attorneys did not mention any serious conflicts which had arisen because the organizational communication structure was not defined.

An overview of the role of the school attorney is presented in Table 2. The replies of school attorneys, superintendents, and board chairmen are contained in

this table. The frequency of involvement and amount of responsibility are shown in two major columns.

The principal findings as revealed in Table 2 are:

1. The school attorney is most frequently involved in *board procedure issues*. These include the following: prepares meeting agendas, receives a copy of board meeting agendas, attends local board meetings, reviews copy of board minutes, reviews all policy statements.
2. The second major area of involvement for the school attorney in Minnesota is *personnel*. These areas include: procedures for affirmative action, collective bargaining, negotiations, master agreement for board, employee dismissal hearings, grievance procedures, job application forms, workman's compensation claims, confidentiality of records.
3. The third most frequent area of involvement for the school attorney is *district business/communication*. These items include: local conferences for school administrators, regional and national conferences for school administrators, in-service educational law workshops, attention to new statutes and court opinions.

Comparing the rank-ordered list for areas of involvement to the rank-ordered list for amount of responsibility, one easily notices that the order of subjects is non-identical, except for the last subject: public school/private school contacts. Findings from this table are:

1. Attorneys hold the most responsibility when involved with issues pertaining to the *buildings and grounds* of the school district. These issues include: land and building selection, land site acquisition, contracts for sale or lease of property, claims of damage, strike or permanent building closings, and building accessibility.
2. The second highest ranked area where attorneys hold responsibility is *students*. These issues include: injury claims, student fees, dress codes, search and seizure, confidentiality of student records, due process hearings.
3. The third highest rank area for attorney responsibility is *personnel*. These items are identical to those presented previously.

The only subject area commonly listed for the top three subjects of the rank-ordered scales for frequency involvement and amount of responsibility is that of personnel.

CONCLUSION

Responses to the questionnaire revealed that school attorneys view themselves as being more frequently involved in school district decision-making and having a larger amount of responsibility than did the superintendents and school board chairmen. Thus, for many districts, a better organizational network with written policies to define job description and employment process should be implemented. This is especially critical for districts with more than 1500 students, as school attorneys are more frequently employed or consulted in larger districts.

As the findings indicated that areas having most attorney involvement and responsibility were board procedures, personnel, district business and commu-

nication, buildings and grounds, and students, the board and superintendent should review and clarify the written policies dealing with each of these areas. It would certainly make for a smoother running school district and would also help to clarify the school attorney's role.

Table 1
School District Information

District Size	01–400	401–750	751–1500	1501–50,000
Source of legal information	M.S.B.A.	M.S.B.A.	M.S.B.A.	school attorney
Consultation of same attorney (regardless of issue)	No	No	No	Yes
Employment process	by superintendent (informal process)	by superintendent or board member (informal process)	by board interview (formal process)	by board interview (formal process)
Employment arrangement	verbal	board resolution	board resolution	board resolution
Written policies	No	No	No	No
Description of attorney's functions	none	vaguely	vaguely	vaguely
Source of direction	superintendent	superintendent	superintendent	superintendent
Method of payment	fee basis	fee basis	fee basis	fee basis
Amount of money (mean amounts)	$66.21	$968.65	$2,537.99	$13,108.23

Table 2
Rank Order of Mean Scores: Role of School Attorney

Frequency of Involvement				Amount of Responsibility			
Rank	Order			Rank	Order		
1	B	Board Procedures	5.7	1	C	Buildings & Grounds	6.1
2	H	Personnel	4.7	2	I	Students	5.75
3	A	District Building/Communication	4.51	3	H	Personnel	5.72
4	C	Buildings & Grounds	4.5	4	G	Finance	5.71
5	I	Students	4.4	5	A	District Business/Communication	5.5
6	G	Finance	4.1	6	B	Board Procedures	5.1
7	E	Curriculum	3.6	7	F	Desegregation	4.6
8	F	Desegregation	3.4	8	E	Curriculum	3.9
9	D	Public School/Private School Contacts	3.2	9	D	Public School/Private School Contacts	3.5

Please note the typesetting error on page 23, paragraph 2, sentence number 4. The sentence should read:

"Salaries for senior in-house attorneys ranged from less than $30,000 to more than $100,000 per year and the average for institutions with budgets in excess of $50 million was $54,000 in 1983."

CHAPTER 4

Pros and Cons of Providing In-House Counsel as Compared to Retaining an Outside Law Firm: A Superintendent's Point of View

by: William A. Anderson
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Des Moines Independent Community School District
Des Moines, Iowa

HIRING IN-HOUSE COUNSEL

Districts hiring in-house legal counsel will have easy access to legal input for decision making but may use outside legal counsel for litigation and specialized legal problems. The direct availability of legal counsel may provide school administrators with answers to many related questions, but this may result in overdependence upon legal counsel for administrative judgments and increased legal costs.

A few districts have hired an attorney on a part-time basis as a regular school employee. But this does not appear satisfactory, because both the school and the attorney's other clients place demands on the attorney's time, and conflicts and disputes may arise.

Full-time legal counsel has several advantages. Through continuous contacts with board members and administrative staff, school counsel can obtain a far greater appreciation of the district's total operation than retained counsel can at arm's length. The various internal relationships, inner workings of the district, and complexities of education will be better understood. Counsel is immediately accessible when needed which can be very important in crisis situations when time is a decisive factor. Otherwise school counsel may be representing another client, involved in a trial, preparing an appellate brief, or otherwise engaged in pursuits which may have a higher priority than the commitment to the school district.

As noted above, one drawback of having an attorney so easily accessible occurs when school administrators and board members turn to the attorney for the solution of problems that should—and could—be solved by board policy, administrative regulations, reference to past practice, their own professional knowledge, or even common sense. This overdependence upon another outside authority produces static administrators and petrified school boards.

Districts with an enrollment of 75,000 pupils or more should consider the possibility of full-time legal counsel. In districts with smaller enrollments the board of education should consider its annual expenditures for legal fees and determine the point at which the total expenditure is equivalent to the salary and office overhead for a full-time counsel. The salary of the school in-house attorney will need to be at least comparable to that of the district's associate or assistant superintendent in order to attract the caliber of individual needed.

Higher education institutions have tended in recent years to have full-time in-house legal counsel. A survey of such institutions in 1984 showed that forty-seven percent of those responding did have full-time in-house counsel; this figure is double that of 1972.[1] Seventy percent of those institutions with budgets in excess of $50 million have such an arrangement. Salaries for senior in-house attorneys ranged from less than $30,000 to more than $1,000,000 per year and the average for institutions with budgets in excess of $50 million was $54,000 in 1983. For most of these institutions, a combination of full-time in-house counsel and part-time outside counsel was needed to achieve optimum total service.[2]

Total legal office budgets for institutions primarily using in-house counsel averaged about $177,000 per year excluding costs of any services provided by outside counsel. The median additional cost to such institutions for services provided by outside counsel was $50,000 per year. Thus, total legal costs were approximately one-quarter of a million dollars per year for institutions using in-house counsel.[3] These expenses include the cost of legal secretaries or paralegals to provide useful research assistance.

An in-house school attorney will need as a resource center for his work a substantial library to be provided by the district.[4] Such a library should contain a set of the annotated statutes or the compiled laws of the state. Access to both a state digest and a national digest should be provided as well as the published opinions of the state attorney general for approximately the past ten years. The published rules and regulations of all state agencies having some degree of administrative authority over the schools should be secured. Clerical help will be necessary to keep all references up to date.

In summary, in-house legal counsel is usually able to:

1. Know the clients needs best, particularly in matters of governance and policy.
2. Be more readily available for consultation.
3. Provide institutional continuity and depth of experience in handling problems of a recurring nature.
4. Be more effective in marshalling governmental assistance and in handling matters of administrative law and procedure.
5. Provide more knowledgeable guidance in planning steps to prevent legal problems in institutional matters.

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[1] Reidhaar, "Delivery of Legal Services to Higher Education Institutions", West Education Law Reporter, NACUA, Vol. 14 No. 11, p 304.

[2] *Id.*

[3] *Id.*

[4] Use of law firm on a retainer or fee basis avoids this overhead expense.

RETAINING A LAW FIRM

Generally a school district hires a law firm to represent the school and then works regularly with one or two members of the firm. This approach is particularly valuable because school law issues involve many different legal areas such as contracts, property, wages and hours, and constitutional rights. Most law firms have at least an informal specialization of practice that will allow the school attorney to confer with his or her associates in their areas of special knowledge and experience. This law firm approach also allows the school to contact other firm members when the school's regular attorney is not available. A law firm can meet peak and unusual demands in better fashion than an individual attorney. The employment of a full-time outside counsel who operates a one-man office has disadvantages since even the best of school attorney cannot be versed in all functions necessary to the district's legal services needs which will vary over a period of time.

In arrangements employing outside counsel, attorney fees are usually charged on an hourly basis for routine work done by the attorney. But some circumstances may arise in litigation when it is better to have a fee arrangement contingent on the outcome of the lawsuit. Some school districts pay their attorney a retainer, but a number of reasons make retainers generally undesirable. In some states the use of retainers is legally questionable. Generally retainers reflect a belief that services will be performed on a regular basis which may or may not turn out to be the case.

The district may employ a law firm for day to day operations and for its overload legal work hire on an ad hoc basis other law firms as "associate counsel" with the regular school attorney's office. This allows the district's attorney to draw on the research talents and expertise of the "associate" firm and negates the need to hire the second firm to handle the entire matter. Firms to be so utilized should be selected in advance.

The employment of a law firm on an hourly or retainer basis supplemented by "associate counsel" when needed usually means the district's attorney will:

1. Be more knowledgeable and adept in matters of courtroom practice and procedure.
2. Have ready access to more extensive legal library facilities although this may become less significant with the advent of computer-assisted legal research.
3. Be able to marshal more lawyers in matters of crisis.
4. Provide specialists for skilled consultation on highly specialized matters of law.
5. Be considerably less expensive than in-house counsel. District costs per year for employing outside counsel have averaged only one-third to one-fourth the costs of the legal services provided other educational institutions, with budgets of $50 million or more, which employ an in-house attorney.

CHAPTER 5

The Function and Professional Responsibilities of Bond Counsel*

HISTORICAL EVOLUTION AND MODERN FUNCTION OF BOND COUNSEL

Historical Evolution

The function of bond counsel originated in the 19th century. Litigation over bond issues in that era often resulted in judicial determinations that the bonds had been issued irregularly and were therefore invalid.[1] Invalidity of bonds frequently resulted from defects peculiar to municipal finance, such as lack of pub-

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* Reprinted with permission from National Association of Bond Lawyers, *The Function and Professional Responsibilities of Bond Counsel and Model Bond Opinion Project, 1985.*

This statement was prepared by the Committee on Professional Responsibility of the National Association of Bond Lawyers and approved by the Association's Board of Directors on November 17, 1983. The Board of Directors has authorized its distribution to the membership and other persons involved or interested in the authorization, issuance and sale of the debt instruments of states and their political subdivisions (hereinafter "bonds").

The statement evolved from a project that began in 1979 under the leadership of former Committee Chairman Harold B. Judell. The newly formed Committee on Professional Responsibility determined that a code of professional responsibility should be adopted by the Association since the unique role of bond counsel was not addressed in the Model Code of Professional Responsibility promulgated by the American Bar Association and adapted in most jurisdictions (the "Code"). Several drafts were developed by the full Committee.

Under the leadership of former Committee Chairman Charles C. Mulcahy, a drafting subcommittee was formed consisting of: Donald L. Howell, Harold B. Judell, Charles C. Mulcahy, William L. Nelson, and Paul R. Schilling.

Geoffrey C. Hazard, Jr., Deputy Dean, Yale School of Organization and Management, was engaged to advise and assist the drafting subcommittee. Dean Hazard was then also serving as principal reporter for the American Bar Association's Proposed Model Rules of Professional Conduct (the "Rules"). The subcommittee benefited significantly from the early Committee drafts, Dean Hazard's insights, continued direction and support from the Board of Directors and comments gathered at the 1982 and 1983 Bond Attorneys' Workshops.

Unlike the Code, the Rules address situations where lawyers serve in non-advocacy roles. As the Rules advanced, the focus of the drafting subcommittee shifted. Rather than promulgating additional rules, its objectives became the development of a description of the unique function of bond counsel and provision of guidance with respect to matters of professional responsibility associated therewith.

Application of this statement is limited to lawyers serving as bond counsel. It does not discuss the role and responsibilities of other lawyers involved in bond issues or lawyers engaged in other aspects of municipal finance.

[1] *See Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Vol. VI, Reconstruction and Reunion (1864-88)*, Chapters 12 and 13, by Professor Charles Fairman (1971).

lic purpose, violation of stringent debt limitations and absence of proper approval by the electorate. Findings of invalidity often resulted in substantial losses to investors. Investors discovered that the limitation on incurrence of governmental debt were substantial and significantly different from those governing private corporations, and that they were deemed to have knowledge of those limitations. Unlike most private corporations, governmental issuers could avoid debt that was *ultra vires*, i.e., outside the scope of their powers. That realization created an uncertainty among investors which made it difficult for public bodies, especially small communities and those that borrowed infrequently, to raise necessary funds on reasonable terms.

In response to investor concerns, it became the practice for issuers to obtain an opinion regarding bond validity from lawyers whose expertise, objectivity and professional standing made their opinions acceptable to the bond underwriters through whom bond issues were sold to investors. A bond issue accompanied by an approving opinion of recognized bond counsel could be readily sold. Use of bond counsel opinions became well established by 1900 and has since remained a standard practice of bond issuance.[2]

Modern Function

Today, bond counsel are lawyers engaged to provide an expert and objective legal opinion with respect to the validity of bonds and other subjects the opinion addresses. The opinion is an objective judgment rather than the partisan position of an advocate. It ordinarily is required by purchasers in order to provide assurance to investors. As practice has evolved, bond counsel often supervise the procedures of issuance.

Bond counsel are engaged (1) for bond issues the proceeds of which are used to finance facilities owned and operated by the issuer or other governmental body (or to finance governmental programs such as student loans) and (2) for "conduit financings," such as industrial development bonds, in which proceeds are used to construct facilities operated and frequently owned by private entities but whose construction is found by the issuer to serve a public purpose. The first type of issue reflects essentially a two-party transaction between the issuer and bond purchasers. The second type is essentially a three-party transaction involving the issuer, bond purchasers and the user of the facility, who is generally liable for payment of the bonds. Either type of transaction may involve an underwriter and a trustee for bondholders.

THE BOND OPINION

Subject Addressed

Bond counsel's opinion usually addresses the following subjects:

(1) whether the bonds are valid and binding obligations of the issuer;

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[2] A judicial determination known as a "validation" procedure is sometimes used as an alternative or supplement to reliance upon a bond counsel opinion. Validation is a special legal proceeding to obtain court approval of the validity of a bond issue. Some states have special legislation requiring or permitting validation procedures upon *ex parte* motion of the issuer without the normal judicial requirement that there be a "case or controversy". Bond counsel sometimes require such proceedings to resolve novel or difficult legal questions. Validation proceedings can address only validity and other state law questions and thus cannot assure the exemption of interest on bonds from federal income tax. For novel or difficult questions in the latter area, bond counsel may require a ruling from the Internal Revenue Service before delivering an opinion with respect to a particular issue. The vast majority of bond issues are sold on the basis of a bond counsel opinion not supplemented by or based on either a validation or a federal tax ruling.

(2) the source of payment or security for the bonds; and

(3) whether and to what extent interest on the bonds is exempt from federal income taxes and from taxes, if any, imposed by the state of issue.

The opinion should be based upon a reasonably sufficient examination of material legal and factual sources and reasonable certainty as to the subjects addressed therein. As to subjects about which the opinion is unqualified, bond counsel should have concluded that it would be unreasonable for a court to hold to the contrary.

The opinion does not constitute or imply a recommendation of the market or financial value of the bonds or an assessment of the strength or appropriateness of the covenants made by any of the parties, the possibility of default (other than on account of invalidity), the eligibility or suitability of the bonds as an investment or other legal or financial aspects of the bonds not expressly addressed therein.

Objectivity of the Bond Opinion

Bond counsel may represent one or more of the parties to a transaction or may be retained solely to render an opinion regarding the bonds as an independent legal expert, i.e., representing none of the parties. Whatever the professional relationship between bond counsel and any of the parties to the transaction, the purpose of the bond opinion is to facilitate sale of the bonds and thereby to assist the issuer in carrying out the public purpose for which the bonds are issued. This result can be achieved only if bond counsel's opinion is accepted as reliable in the bond market. Since an advocate's opinion, arguing for debatable validity, would not provide assurance to investors, it is in the interest of all parties that bond counsel give an objective opinion. Objectivity is required even when bond counsel represents one of the parties in the transaction or is presently, or has been, engaged in other representation of any party to the transaction.

Bond counsel's objectivity is often misunderstood. It is sometimes assumed that in being objective bond counsel fails to exhibit proper loyalty to the engaging party. This confusion stems from the supposition that a client is always best served by partisanship on the part of counsel. Partisanship is, of course, necessary in litigation and ordinarily appropriate in many other situations. However, since the purpose of the opinion is to provide assurance to prospective investors, bond counsel's function is to render an objective opinion based on reasonable certainty rather than plausible argument.

Model Opinions

The Committee on Opinions of the National Association of Bond Lawyers has developed model opinions for the principal types of bonds.[3]

ADDITIONAL FUNCTIONS OF BOND COUNSEL

Bond counsel frequently is engaged to perform services in addition to rendering the bond opinion. The following are representative examples:

(1) assisting in planning the financing and structuring the bond issue and, where appropriate, preparing enabling legislation or constitutional amendments;

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[3] National Association of Bond Lawyers, Committee on Opinions, *Model Bond Opinion Project*, 15 The Urban Lawyer 985 (1983).

(2) preparing or supervising the bond proceedings, including preparation of documents necesssary or appropriate to the authorization, issuance, sale and delivery of the bonds;

(3) assisting the issuer or others in various aspects of preparing the official statement, private placement memorandum, or other form of offering statement, to be disseminated in connection with the sale of the bonds;

(4) obtaining from governmental authorities such approvals, rulings, permissions, and exemptions as bond counsel determines are necessary or appropriate with respect to the issue;

(5) rendering opinions on related matters such as:

(a) the applicability of particular provisions of federal and state securities laws;

(b) the applicability of tax law provisions governing estate and gift taxation;

(c) eligibility of the bonds for investment by various fiduciaries and other regulated investors;

(d) the status of the bonds and related obligations under laws relating to creditors' rights;

(e) the validity and enforceability of security agreements, indentures and other documents related to the bonds and their security;

(6) assisting in presenting information to bond rating organizations; and

(7) assisting in other specified activities related to the bonds.

PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL

Significance of Client Relationship

In the issuance of bonds payable from tax revenues or other public funds, bond counsel ordinarily is engaged by the issuer. In the issuance of industrial development bonds and other types of conduit bonds, in some jurisdictions bond counsel is engaged by the issuer, but in other jurisdictions bond counsel is engaged by the enterprise for which the facility is being financed. In some instances, particularly where all parties are each independently represented, bond counsel may be understood as being an independent technical expert not representing any party.

Although the bond opinion must be objective regardless of the bond counsel's professional relationship with the parties, the existence of a client relationship may be signficant in determining the nature and extent of bond counsel's professional responsibilities. A bond transaction often involves various allocations of obligation, authority and risk among the issuer, the investor, and other parties such as an underwriter or a trustee. Industrial development bonds and other conduit financings involve further complication due to the presence of additional parties. The transaction documents may contain various provisions relating to such matters as control and disbursement of bond proceeds, investment of funds, choice and supervision of construction contractors, financial reporting, insurance, remedies upon default, indemnification and other responsibilities of the parties. Even though conventional language is often available for these and

other particulars, there may be alternatives to such language which shift risks or have distinctly different consequences for each party. All parties to the transaction must be dealt with according to applicable standards of fair dealing, but within such standards there are areas of negotiation. In areas of negotiation, a party who is bond counsel's client is entitled to be advised of advantageous alternatives and to be assisted in pursuing them. The fact that a client is entitled to such special protection, even where conventional provisions are likely to be used, can affect the parties' expectations during the transaction and the extent of bond counsel's obligations and potential liability if litigation should later arise.

At the outset of an engagement, bond counsel should make clear whether, in addition to rendering the opinion, bond counsel undertakes to represent any of the parties, and, if so, whom. Otherwise, doubt as to the matter might arise and courts could infer that bond counsel has a client relationship with any party who reasonably supposed itself to be a client.

Bond counsel may represent more than one party to the transaction when doing so is permitted under the applicable rules regarding multiple representation and conflict of interest. The need to identify the client is heightened in instances of multiple representation because a party might assume from the fact of multiple representation that bond counsel represents all the parties to the transaction.

Significance of Substantive Law

Bond transactions are subject to complex legal regulations, particularly bond issuance procedures mandated by state law, disclosure requirements established by federal and state securities laws, and tax exemption provisions embodied in federal and state tax law. These regulations are potentially significant in the performance of bond counsel's functions because bond counsel, as licensed lawyers, have a specific professional obligation to conform their conduct to law. In addition, bond counsel are subject to the rules of professional responsibility that regulate the legal profession.

Rules of Professional Conduct

The legal profession is presently regulated by the Model Code of Professional Responsibility promulgated by the American Bar Association (the "Code") as adapted in various jurisdictions. The American Bar Association has adopted comprehensive new rules to replace the Code in the form of Model Rules of Professional Conduct (the "Rules"). Although the Code and Rules have quite different formats, their substance is similar.

- **Rule 2.3—Evaluation For Use By Third Parties.**

The Rules mark a departure from the Code's emphasis on advocacy to the exclusion of other attorney roles. The Code has no provision directly referring to bond counsel's function, although case law has acknowledged analogous functions.[4] The Rules, however, describe an attorney's role which approximates bond counsel's function. Rule 2.3, Evaluation For Use By Third Parties, provides:

> (a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

[4] *Cf.* **Gleason v. Title Guarantee Co., 300 F.2d 813 (5th Cir. 1962) (attorney's examination of title to real property).**

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.

(b) Execpt as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

The accompanying comment, entitled "Duty to Third Person", provides, in part:

> . . . [S]ince such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client.

While not as yet adopted by any jurisdiction, this rule offers guidance for bond counsel.

- **General Standards.**

Of particular concern to bond counsel are those general standards relating to competence; conformity to law; duties to clients; and, duties to third persons:

a. Competence

Under Code DR 6-101(A)(1), a lawyer may not undertake a matter "which he knows or should know that he is not competent to handle. . . ." EC 6-3 observes that "a lawyer generally should not accept employment in any area of the law in which he is not qualified", which implies a presently established competence in the specific field. The counterpart Rule is Rule 1.1, which states that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation".[5]

b. Conformity to Law

Under Code DR 7-102(A)(7), a lawyer may not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent". Code DR 7-102 (A)(8) provides that a lawyer may not "knowingly engage in other illegal conduct". The Rules counterpart, Rule 1.2(d), provides that a lawyer shall not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent", and Rule 8.4(b) and (c) provide that it is a professional violation for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer" or to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation". Thus, as stated in *In re Blatt*:[6]

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[5] *See*, Smith v. Lewis, 13 Cal.3d 349, 358-59, 118 Cal. Rptr. 621, 627, 530 P.2d 589, 595 (1975), *overruled on other grounds*, In re Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976):

> [A]n attorney . . . is expected . . . to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques . . . [E]ven with respect to an unsettled area of the law . . . an attorney assumes an obligation to his client to undertake reasonable research . . . and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.

[6] 65 N.J. 539, 545, 324 A.2d 15, 18-19 (1974).

> A lawyer may not follow the directions of a client without first satisfying himself that the latter is seeking a legitimate and proper goal and intends to employ legal means to attain it. . .[The lawyer's] duty, upon being requested to draft the aforementioned agreements, was to learn all the details of the proposed transaction. Only then, upon being satisfied that he had indeed learned all the facts, and that his client's proposed course of conduct was proper, would he have been at liberty to pursue the matter further.

c. Duties to Clients

(i) *Objectives and Means.* Code DR 7-101 (A)(1) and (3) respectively provide that a lawyer shall not intentionally "fail to seek the lawful objectives of his client through reasonably available means" or "prejudice or damage his client during the course of the professional relationship". EC 7-7 observes that "in certain areas of legal representation not . . . substantially prejudicing the rights of a client, a lawyer is entitled to make the decisions on his own. But otherwise the authority to make decisions is exclusively that of the client." EC 7-8 observes that "in the final analysis, however, the . . decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client". Rule 1.2(a) states that "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued". As stated in *Olfe v. Gordon*:[7]

> It has generally been recognized that an attorney may be liable for . . . failure to follow with reasonable promptness and care the explicit instructions of his client. Moreover, an attorney's honest belief that the instructions were not in the best interests of his client provides no defense . . .

(ii) *Communication.* EC 7-8 of the Code states that "a lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations," and EC 9-2 states that " a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client". Rule 1.4(b) provides that "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation". As stated in *Barker v. Humphrey*:[8]

> It is the duty of an attorney to advise the client promptly whenever he has any information to give which . . . the client should receive.

(iii) *Fees.* Code DR 2-106(A) provides that a lawyer "shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee". Rule 1.5(a) provides that "a lawyer's fee shall be reasonable". EC 2-19 states that "it is usually beneficial to reduce to writing the understanding of the parties regarding the fee. . . ." Rule 1.5(b) provides that "when a lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation". As stated in *Randolph v. Schuyler*:[9]

> [A] contract made between an attorney and his client . . . concerning the fee . . . [must be] shown to be reasonable and to have been fairly and freely made, with full

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[7] 93 Wis.2d 173, 182, 286 N.W.2d 573, 577 (1980).

[8] 101 U.S. 494, 500 (1879).

[9] 284 N.C. 496, 504, 201 S.E.2d 833, 837-38 (1974).

> knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee.

(iv) *Confidentiality*. Code DR 4-101 provides that a lawyer shall not knowingly reveal or use for his or her advantage or the advantage of a third person "information protected by the attorney-client privilege . . . or . . . other information gained in the professional relationship that the client has requested be held inviolate or the disclosures of which would be embarrassing or would be likely to be detrimental to the client". Rule 1.6 provides that a lawyer "shall not reveal information relating to the representation of a client . . . except for disclosure that are impliedly authorized in order to carry out the representation . . . ." The United States Supreme Court in *Upjohn Co. v. United States*,[10] quoted with approval EC 4-1 of the Code:

> The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

(v) *Conflict of Interest*. Code DR 5-105(c) provides that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." Rule 1.7(b) provides that "a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person . . . unless the lawyer reasonably believes the representation will not be adversely affected . . . and the client consents after consultation." For this and other purposes under the Rules, "consultation" means "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question". As stated in *Kelly v. Greason*:[11]

> [A] lawyer, as one in a confidential relationship and as any fiduciary, is charged with a high degree of undivided loyalty to his client . . . Thus, with rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship . . . . In the exceptional situations where representation may be permissible . . . the lawyer must . . . disclose to all affected parties the nature and extent of the conflict and obtain their consent to the continued representation.

d. Duties to Third Persons.

Code DR 7-102(A)(5) provides that "in his representation of a client, a lawyer shall not . . . knowingly make a false statement of law or fact". DR 7-104 (A)(2) provides that a lawyer shall not "give advice to a person who is not represented by a lawyer, other than the advice to secure counsel . . . ." Rule 4.1 provides that a lawyer shall not "make a false statement of material fact or law to a third person; or . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by [the rule of confidentiality]". Rule 4.3 provides that "in dealing on behalf of a client with a person who is not represented by counsel, a lawyer

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[10] 449 U.S. 383, 391 (1981).

[11] 23 N.Y.2d 368, 375-76, 296 N.Y.S.2d 937, 244 N.E.2d 456, 460 (1968).

shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding". As stated in *United States v. Benjamin*:[12]

> [Lawyers may not] shut their eyes to what was plainly to be seen or . . . [represent] a knowledge they knew they did not possess.
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> [The lawyer's] opinion letter made a positive statement that he believed [the securities] were exempt from registration, although he must have known [facts indicating the contrary].

CONCLUSION

The National Association of Bond Lawyers believes that this statement will clarify the function and responsibilities of bond counsel both for the lawyers serving in that capacity and those who use their services.

[12] 328 F.2d 854, 863 (2d Cir. 1964), *cert. denied*, 377 U.S. 953 (1964).

CHAPTER 6

Problems of School Board Attorneys: Ethics And Due Process

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Who is the client?[1] What is the relationship of the board attorney to the administration and the school board? This chapter will focus upon issues which have been seldom discussed in legal literature. Issues for which there are no clear answers will be raised. Clearly, however, school attorneys must be sensitive to ethical and due process concerns under the Canons of Ethics and the fourteenth amendment, as school corporations and school boards find themselves more often acting in quasi-judicial capacities.

The relationship of the school attorney to the school district, the school administration, and the board should be reviewed in the context of proceedings for student discipline or teacher or administrator termination or hearings involving grievances, discrimination charges or challenges to student records. In each of these instances, the attorney may well have advised the administration during the course of administrative action, and then be expected to sit with the board as it hears the matter in a quasi-judicial setting and as it deliberates. What is the attorney's role in these circumstances?[2]

ETHICAL CONCERNS

Canon 5 provides, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."

Ethical Consideration 5-1 provides:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and

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[1] Adapted from Bittle, "Problems of School Board Attorneys: Ethics and Due Process," School Law in Contemporary Society 172 (Nolpe/McGhehey 1980).

[2] Stephen Solomon, *The Corporate Lawyer's Dilemma*, Fortune, Nov. 5, 1979, p. 138. In his article, Solomon writes about "The Corporate Lawyer's Dilemma." He raises the question "whom does the corporate lawyer work for: (A) management, (B) the board of directors, or (C) the shareholders?" He asks: "If the answer to the first question is either A or B, a second question arises: when is a lawyer obliged to blow the whistle on his client?"

loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Ethical Consideration 5-14 provides:

> Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

Ethical Consideration 5-18 provides:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.[1]

Another ethical consideration should be mentioned. EC 5-11 provides:

> A lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. In like manner, his personal interests should not deter him from suggesting that additional counsel be employed; on the contrary, he should be alert to the desirability of recommending additional counsel when, in his judgment, the proper representation of his client requires it. However, a lawyer should advise his client not to employ additional counsel suggested by the client if the lawyer believes that such employment would be a disservice to the client, and he should disclose the reasons for his belief.

Under Canon 7, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." The lawyer has a duty, both to his client and to the legal system.

Under Canon 9, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

Ethical Consideration 9-1 provides:

> . . . A lawyer should promote public confidence in our system and in the legal profession.[1]

Ethical Consideration 9-2 provides:

> Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard

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[1] Brian D. Forrow, *The Corporate Law Department Lawyer: Counsel to the Entity*, 34 Bus.L. 1797 (1979); *See also* Panel Discussion: *The Murky Divide: Professionalism and Professional Responsibility, Business Judgment and Legal Advice—What is a Business Lawyer?*, reprinted in 31 Bus.L. 457 (1975); and Panel Discussion: Advisors to Management at ABA National Institute October 3, 1974, *Responsibility of Lawyers Advising Management*, reprinted in 30 Bus.L. 13 (1975).

against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

Ethical Considerations 7-3, 7-4, and 7-8 are also particularly relevant. They provide as follows:

Ethical Consideration 7-3:

Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

Ethical Consideration 7-4:

The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

Ethical Consideration 7-8:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

For school board attorneys who have been involved in desegregation or other highly volatile public issues, the provisions of EC 7-17 may be particularly relevant:

The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with

circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

DUE PROCESS CONSIDERATIONS

Consider for a moment the role of the school board attorney in a teacher termination proceeding. Courts have defined that the minimal requirements of due process require: (1) clear and actual notice of the reasons for termination in sufficient detail to enable the teacher to present evidence relating to them; (2) notice of the names of those who have made allegations against the teacher and the specific nature and factual basis for the charges; (3) a reasonable time and opportunity to present testimony in his or her own defense; and (4) a hearing before an impartial board or tribunal.[4] In some states these are specified in the statutes.

The school board must be an impartial decisionmaker.[5] The board must not be involved in an investigation, recommendation, or prosecution of the case, and no member can be biased or have a personal interest in terminating the teacher.

How, then, is a termination proceeding commenced? Ordinarily, the principal or superintendent will complete evaluations in one form or another and make a determination that a teacher should be terminated. At this point in the process, the administration should be consulting with legal counsel to review the facts, to review the sufficiency of evidence, and to have a determination by legal counsel as to whether the facts sufficiently support a finding of just cause. While the just cause finding may not be necessary in those states with no tenure or just cause statutes, legal counsel at this point in the proceedings should ensure that all legal due process procedures are followed.

What, then, should the role of legal counsel be when the notice is given and the hearing is held before the board of directors? Can legal counsel then sit with the board to advise the board during the course of the hearing and assist the board in drafting findings of fact and conclusions?

If the legal counsel presents the case for the superintendent, or has assisted in the preparation of the case, counsel's role at the hearing may be similar to that of any other administrative hearing. The attorney may ask the questions and conduct the cross-examinations, object to the introduction of irrelevant evidence, and make opening and closing statements, and prepare briefs. If the legal counsel presents the case for the superintendent or administration, counsel should not rule on evidentiary objections raised during the course of the hearing, nor should counsel participate in any way in the deliberations by the board following the hearing.

In the case of *Weissman v. Board of Education of Jefferson County School District*,[6] the Colorado Supreme Court said that school counsel who had taken part in an adversary proceeding in the role of prosecutor should not be present during board deliberations concerning the termination. In that case, the school counsel acted as a prosecutor at the hearing and then accompanied the board into deliberations without also allowing the teacher's counsel to be present during the deliberations. While the court did not overturn the board's decision to

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[4] Brouillette v. Bd. of Dir. of Eastern Iowa Community College, 519 F.2d 126 (8th Cir. 1975).

[5] Keith v. Comm. School Dist. of Wilton, 262 N.W.2d 249 (Iowa 1978); Hortonville Educ. Assn. v. Hortonville Joint School District No. 1, 66 Wis.2d 469, 225 N.W.2d 658 (1975), *rev. on app.* 426 U.S. 482 (1976); *Brouillette*, 519 F.2d at 126.

[6] 190 Colo. 414, 547 P.2d 1267 (1976).

dismiss the teacher since there was no evidence that counsel influenced the board's determination, the court did say that counsel should not do this in the future, regardless of whether he voted or not. The decision is based on due process considerations and does not discuss in any way the Canons of Ethics.

Another case dealing with school board counsel's role is *Doran v. Board of Education of Western Boone County Community Schools*.[7] In *Doran*, the superintendent prosecuted the case against a teacher; the school board's attorney represented the superintendent. The school superintendent and the school attorney met with the board in closed executive session following the hearing without permitting the teacher or his representative to be present. The teacher argued that he did not get an impartial hearing because the school attorney acted as both prosecutor and legal advisor to the board. Indiana's appellate court did not overturn the dismissal on that ground, because it said that in administrative hearings, it is not unusual for the agency to be both the accuser and the judge. Further, the court noted that the school board's attorney did not participate in the board's decision, did not rule on evidence, and did not make statements to pursuade or dissuade the board in executive session.

In *White v. Board of Education*,[8] the Supreme Court of Hawaii held that the school board's counsel who had participated and acted as counsel for the superintendent in an adversary hearing should not have consulted with the board in its decision-making function. The court further held that the superintendent should not have gone with the board into executive session. The court said:

> These actions of the deputy attorney general and the Superintendent cast suspicion on the integrity of the hearing conducted by the Board and it must be deemed that procedural errors were committed.[9]

In that case, the court did not overturn the board's decision but, rather, remanded the case to the board for a rehearing.

In the case of *State ex rel. Wasilewski v. Board of School Directors of Milwaukee*,[10] the school board attorney presented the case to the board and then drafted the findings of fact and conclusions of law without giving teacher's counsel a chance to look at the findings or to draft his own findings. The court said:

> While it would have been better practice for counsel for the board to have submitted his draft of the findings and conclusions to relator's counsel in advance of board action thereon, and for the board to have accorded relator's counsel the like privilege of drafting proposed findings and conclusions, we find no lack of due process in such omissions.[11]

Many districts use two attorneys in termination proceedings. One attorney aids the superintendent in preparation and presentation of the case and in the writing of the brief to the board, while the other attorney advises the board procedurally, rules on evidentiary objections, and assists in writing the findings of fact and conclusions of law.

Where two attorneys are used, it is based on the assumption that two attorneys will ensure proper presentation of the record, and that the decision is properly

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[7] 152 Ind. App. 250, 283 N.E.2d 385 (1972).

[8] 54 Hawaii 10, 501 P.2d 358 (Hawaii 1972).

[9] 501 P.2d at 363.

[10] 14 Wis.2d 243, 111 N.W.2d 198 (1961), *cert. den.*, 370 U.S. 720 (1962).

[11] 111 N.W.2d at 212.

made. Experience has taught that mistakes in termination proceedings can be expensive, both in terms of lost time, litigation expense, and liability for back pay in the event the board's decision is overturned, not to mention the problems inherent with reinstatement following termination and protracted litigation.

CONFLICT OF INTERESTS

There is little scholarly writing on this subject. A 1976 law review note discusses a conflict of interest of Indiana city attorneys.[12] The writer notes that under the strong mayoral form of government in Indiana, the mayor appoints the city attorney. The legal department is within the executive branch, while at the same time, the statute creating the position of city attorney directs the attorney to advise all branches and departments of the city's government. This is a situation, as the note points out, which presents the city attorney with a clear conflict since inevitably the mayor and the city council will clash over issues on which the attorney will have to advise both parties. In light of this, the Indiana General Assembly empowered the council to hire one or more competent attorneys to furnish legal assistance.

Informal Opinion 1282[13] addresses the question of representation of the police by the city corporation counsel when counsel may have a conflicting duty to represent the city. A suit alleging that the police used excessive and unreasonable force in making an arrest was filed against the city. Representing the city, the corportion counsel investigated the case and took statements of police officers. Following the investigation, corporation counsel recommended settlement, but the city council imposed a condition that the city seek reimbursement from the police officers. There was no prior policy requiring reimbursement, and police officers were not advised prior to the interview to seek counsel, nor were they advised that their statements might be used against them.

The committee concluded that no attorney in the corporation counsel's office could represent either the city or the police in an action seeking reimbursement.

The committee concluded that the corporation counsel could not represent the city because DR 4-101(B) prohibits the disclosure of, or the use of, confidences received from any client to the disadvantage of the client. The committee noted that the police, by virtue of state law, were deemed to have been the corporation counsel's clients at the time statements were taken, and corporation counsel's office could not use the information from them in the representation of the city.

The committee also said:

> Even were a deputy attorney with no knowledge of the confidences to be assigned to the matter, it would still be improper. DR 5-105(d) makes it clear that if a lawyer must withdraw from a matter, no partner or associate of his firm may undertake the same matter.

The committee also noted Canon 9 which provides that even though there may not, in fact, be an impropriety, there should be no appearance of such.

Corporation counsel could not represent the police even if the city consented and the city were represented by outside counsel. The committee said:

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[12] Note, 51 Ind. L.J. 783 (1976).

[13] Informal Opinions: Committee on Ethics and Professional Responsibility 542 (November 21, 1973).

> In a suit by the city corporation as plaintiff against the police officers as defendants, a lawyer paid by and employed by the plaintiff corporation to represent the individual defendants necessarily is in a position where the exercise of his independent professional judgment on behalf of the individual defendants is likely to be adversely affected by his continuing attorney-client relationship with the city. Accordingly, such representation would violate DR 5-105(b); see also DR 5-107(B) and EC 5-15. Consent does not obviate the problem because it is not obvious, as required by DR 5-105(c), that the corporate counsel could adequately represent the interests of the police officers while serving generally as counsel for the city.

The committee addressed what corporation counsel could do in future situations. The committee suggested:

> . . . that in the future (corporation counsel's office) should represent the city in such matters, only if special counsel is immediately appointed to represent the police officers, prior to any undertaking of any sort by your office in the matter. If, for some reason, statutory or otherwise, there continues to be no mechanism for appointing special counsel for employees of the city in such situations, in our opinion your office could not, under any circumstances, undertake representation of either of the parties.

CONCLUSION

To date, courts have not applied the provisions of the the Code of Professional Responsibility where questions have been raised of failure to provide a fair due process hearing. However, several decisions seem consistent with the ethical considerations. As a matter of preventative law consistent with the obligations as a member of the bar, the school attorney must be aware of ethical as well as constitutional due process obligations.

Brian Forrow in an article which appeared in the July, 1979, *Business Lawyer*[14] said:

> The role of corporate counsel will be dependent upon each individual situation. A tenuous balance must be maintained. In viewing this role, one might recall the words of Bill Gossett:
>
> > The future calls on us to combine, if we can, the eloquence of the advocate, the structural sense of the legal architect, and the wisdom of the great judges of the law, who never have failed to see that the law is a part of life and cannot be separated from the aims, the ethics, the hopes, and the will of the people.[15]
>
> To put it another way, in the words of John Subak: It is this skill that will enable the inside lawyer to effectively fulfill his diverse role as "counsel to the entity." As part of the advisor to management, the lawyer can be and is a powerful force for ethical corporate conduct, not because he is a lawyer nor because he knows best, but because the law so often embodies our society's ethical judgments. By training, interest, and background, a lawyer is more often than not a thinking animal, pretty well attuned to what is right and what is wrong. It is this skill that will enable the inside lawyer to effectively fulfill his diverse role as "counsel to the entity."[16]

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[14] Forrow, *supra*, n.3 at 1829.

[15] Gossett, *The Corporation Lawyer's Social Responsibilities*, 60 A.B.A.J. 1517, 1520 (1974).

[16] Subak, *Special Problems of Inside Counsel*, 33 Bus.Law. 1433, 1434 (1978).

CHAPTER 7

Ethical Considerations in School Board Representation

by: Martin Semple

INTRODUCTION

The recent debate over the ABA's Model Rules of Professional Conduct[1] refocused the public's attention on the ethical problems of lawyers. However, perhaps even more necessary than a new code with more specific and detailed directives on ethical issues is a renewed sensitivity to the moral and ethical issues that confront the lawyer in everyday practice.

Most lawyers very often do not recognize blatant ethical problems and violations of the Code of Professional Responsibility. Futhermore, when lawyers do recognize an ethical problem, they do not truly and completely resolve it, but rather interpret disciplinary rules narrowly—failing to treat them as "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[2]

This paper dicusses some of the peculiar ethical issues that confront the school district attorney. It will deal with three broad areas:

1. The conflict between the role of the school attorney as prosecutor or advocate and his role as advisor to the board in its judicial capacity in the same case.

2. The ethical dilemmas in representing the "new" board's changed legal stance; and

3. The conflict inherent in the joint representation of a school district, individual board members and/or school employees.

The discussion that follows is based upon the American Bar Association's Revised Code of Professional Responsibility, adopted in 1969. Also referred to are the Model Rules of Professional Conduct, which were adopted by the ABA in August, 1983.[3]

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[1] 51 U.S.L.W. 2488-292.

[2] Model Code of Professional Responsibility (CPR), Preamble and Preliminary Statement (1969).

[3] The full text of the adopted Model Rules of Professional Conduct (RPC) appears at 52 L.W. 1-27 (1983).

CONFLICTING ROLES: THE SCHOOL ATTORNEY AS PROSECUTOR AND ADVISOR

A modern phenomenon found in school districts is the rising number of hearings that result from due process requirements in teacher dismissals, student disciplinary actions and federal projects such as the placement of special education students under P.L. 94-142.[4] Whenever a multiplicity of adversary hearings culminate in review and final adjudication by the board of education, school attorneys have a potential conflict of interest. When the attorney represents a school district in prosecuting a case against a teacher for incompetency or immorality before a hearing officer or the board of education, obvious ethical problems arise if the attorney later advises the board of education in its judicial role of reviewing and passing final judgment.

This problem was presented to the Colorado Supreme Court in *Weissman v. Board of Education of Jefferson County*.[5] In *Weissman*, a school attorney prosecuted a teacher tenure dismissal case on behalf of the school district before an impartial hearing panel. Then, sitting with the board of education in its executive session, he reviewed the facts and recommendations of the panel, and participated in the decision to terminate the teacher on the grounds of immorality. The teacher challenged the board's decision, *inter alia*, on due process grounds, because the school board's attorney had acted in these arguably conflicting roles. The Colorado Supreme Court concluded:

> Courts which have considered the problem have suggested that a school board's attorney, who has taken part in the adversary proceedings in the role of prosecutor, should not be present during the board's deliberations (citations omitted). We agree. In the future, counsel who has played such a role in the proceedings should take no part in the final deliberations of the board, in order to avoid any appearance of impropriety or unfairness.[6]

However, the court did not overturn the decision of the board; in light of the evidence, the court felt that while the attorney had acted imprudently, he had not influenced the board's decision.

In contrast, in February of that year, the Colorado Court of Appeals overturned a school board decision and reinstated a teacher with back pay, because the prosecuting school attorney answered a question from the board during its review of the findings of fact of the hearing officer in an open session.[7] The court held that the role of the school attorney in answering any question about the merits of the case constituted a denial of due process and inappropriate action on the part of the attorney.

The thrust of the Colorado courts in this matter—that a school attorney's roles of prosecutor and board advisor conflict—has been consistently followed in other jurisdictions[8] with most of the cases usually turning on due process

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[4] *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); Goss v. Lopez, 419 U.S. 565 (1975); 20 U.S.C. §1401 *et seq.* (1978).

[5] 190 Colo. 44, 547 P.2d 1267 (1976).

[6] 547 P.2d at 1276.

[7] Lockhart v. Board of Education, 668 P.2d 959 (Colo. App. 1983), *aff'd in part, rev'd in part*, 687 P.2d 1306 (Colo. 1984).

[8] *E.g.*, Yuen v. Board of Education, 77 Ill. App. 2d 353, 222 N.E.2d 570 (1966); Miller v. Board of Education, 51 Ill. App. 2d 20, 200 N.E.2d 838 (1964); Harrisburg R-VIII, S.D. v. O'Brien, 540 S.W.2d 945 (Mo. App. 1976), State v. McPhee, Wis.2d 190, 94 N.W.2d 711 (1959). *But cf.* Austin v. Maxwell, 456 F.2d 1237 (5th Cir. 1972), (facts as outlined indicate that the attorney advised the board only on procedural questions).

grounds. While the Code of Professional Responsibility does not specifically deal with this "one client, multiple roles" problem, both Disciplinary Rules 5-105 (A), which forbids an attorney from "representing differing interests" and Canon 9, which requires that "a lawyer should avoid even the appearance of professional impropriety," should be looked to for guidance.

In general, the rule prohibiting "conflicts of interest" states that a lawyer should decline employment "if the exercise of his independent professional judgment in behalf of his client will be or is likely to be adversely affected."[9] The difficulty for many attorneys in this kind of situation is in deciding whether their "independent professional judgment" is affected. Arguably, lawyers can advocate one position in an adversary hearing, and then quite objectively and independently advise the board of education in its capacity as the ultimate judge of that same position. Indeed, this objectivity may exist, but a conflict of interest also exists, according to the Code, if a situation involves an attorney in representing "differing interests."[10]

Here, by playing the roles of both advocate and judicial advisor in the same case, the attorney is called on to represent differing interests.[11] While, both in theory and in fact, an attorney may be able to divorce himself from the advocate's position when he is advising the board of education, the perception of the party "on trial" is that it has not received a fair disposition.

The courts adamantly hold that playing the dual role denies due process. In *State v. McPhee*,[12] The Wisconsin Supreme Court stated:

> The basic reason why the same person should not be put in the position of acting as both attorney and judge is that, when he lays down his duties as advocate and assumes those as judge, his activities in the former capacity may tend to influence his judgment while acting in the latter capacity.[13]

Significantly, the Code specifies that in a potential conflict situation, a lawyer "should resolve all doubts against the propriety of representation."[14]

The problem cannot be resolved by simply having a different attorney in the particular law firm advise the board in its deliberations after one of the firm's partners or associates has appeared as the prosecuting attorney. The Code specifically states that when "a lawyer is required to decline or to withdraw from employment under (the disciplinary rules), no partner or associate or any other lawyer affiliated with him or his firm may accept or continue such employment."[15]

It is the attorney's responsibility to explain, *before* any adjudicative process begins, the implications of due process to the school board. He or she must clarify

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[9] DR 5-105(A). *Compare*, R.P.C. Rule 1.7 (1983) which forbids a lawyer from representing a client if representation of "that client will be directly adverse to another client, unless the lawyer reasonably believes the representation will not affect the relationship with the other client . . . ."

[10] C.P.R., DR 5-105(B).

[11] The present Code does not deal at all with the role of the attorney as advisor to a judicial body. *See* EC 7-3. The Preamble to the Model Rules of Professional Conduct is more helpful in discussing the differing roles of the attorney.

[12] 6 Wis.2d 190, 94 N.W.2d 711 (Wis. 1985), *overruled on other grounds*, Stacy v. Ashland County, 39 Wis. 595, 159 N.W. 2d 630 (1968).

[13] *Id.* at 722.

[14] C.P.R., EC 5-15

[15] C.P.R., DR 5-105(D). *Compare*, R.P.C. Rule 1.10.

the varying roles of the attorney—as advocate, advisor, mediator, negotiator and possibly, judge. The attorney must inform the board that there may well be an inherent conflict in assuming all those roles for the same client. When such a conflict occurs, a choice must be made in advance as to which role the school attorney will assume—that of prosecutor and advocate or that of judicial advisor. Once having made that decision, the district must decide whether it wants another independent attorney to fill the other roles or wants to forego legal representation in that situation.

REPRESENTING THE "NEW" BOARD'S CHANGED LEGAL STANCE

One of the inherent ethical problems in the legal representation of a political body is that its composition will change over time. For example, suppose a school board decides to close certain schools and change boundary lines for attendance areas, and is thereafter sued by a group of citizens protesting these actions. The board instructs its lawyer to defend it. Meanwhile, in the political arena, the citizens successfully move to recall some of the board members. With the replacements, there is a "new" majority on the board which agrees with some of the positions of the plaintiffs. The new board directs its attorney to take a position contrary to its previous stance in the lawsuit. The attorney, in furtherance of this, decides to depose the outgoing school board members. Since the attorney represented them in their former capacities, the outgoing members accuse the school attorney of violating their attorney-client relationship and of a breach of the duty of loyalty.

The problems involved in this case are found in many situations. They are particularly acute in desegregation situations, and are found in some lawsuits involving collective bargaining, construction of new schools, and decisions on bond issues.

Two specific ethical questions arise in these situations: (1) Is the attorney representing conflicting interests? and (2) Does representation of this changed interest involve a lack of loyalty?

Potential Conflicting Interest

While the ethics of representing conflicting interests of *successive* clients may cause concern to some, there is certainly nothing wrong with representing the changing interests of the *same* client. In this particular situation, it is vital to remember that the client—the board of education—has not changed,[b] but rather, only its point of view. As will be discussed further below, the attorney's clients is first and foremost the board as a whole, not its individual members. Though the attorney may be representing a changed interest, he is doing so for the same client, regardless of internal changes within that client's structure. The issue may pose a personal moral dilemma, but it does not violate any of the rules or considerations on conflict of interest.

Lack of Loyalty

This second issue is more complicated; moreover, the Code of Professional Responsibility and the newly adopted Model Rules offer limited assistance.

First, though the Code does not specifically mention schools, in reference to dealing with similar entities, the Code states:

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[b] Hegland, *Beyond Enthusiasm and Commitment*, 13 Ariz. L. Rev. 805 (1971).

> A lawyer employed or retained by a corporation or similar entity *owes his allegiance to the entity* and not to a stockholder, director, officer, employee, representative or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.[17] (emphasis added)

Without question, the attorney owes loyalty to the school district or to the board of education as such. The Model Rules specifically state that "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[18] Thus, though the board members may direct the attorney, it is still the board, not those who compose it, that is the attorney's client. In the situation previously presented, the attorney has not breached any duty of loyalty by representing a changed interest, because the client is unchanged.

Although a board attorney and individual board members are not regarded as having attorney-client relationships, in reality, they may interact as if they do. Some authors have labelled the individual board members and superintendents who work closely with the school attorney as "quasi-client[s],"[19] as the individuals may very well treat the school attorney as their own attorney and the attorney may treat the board members as clients in the representation of the school district. Canon 4, which deals with the confidences of a client, may not technically apply to this situation, but any responsible attorney should seriously consider the confidentiality rules before attempting to resolve the problem posed here.

Canon 4 states that an attorney "shall not knowingly reveal *a confidence or secret* of his client; [or] use [them] for the advantage of himself or of a third person unless the client consents after full disclosure."[20] (emphasis added). Note that while the term "confidence" concerns the attorney-client privilege, "secret" concerns any information gained in the professional relationship that "the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client."[21]

A school attorney is in an obvious dilemma if, in a situation such as the one described, an "old" board member revealed "secrets" to the attorney which could significantly help the attorney in representing the "new" board. While the diciplinary rules and ethical considerations make clear that loyalty is owed to the "client" and the client is the school district or the board of education as an entity, there is a broader moral obligation and a sense of professional responsibility—owed at least to the reputation of lawyers as it is perceived by society as a whole.

In effect, this means that while a school attorney has the board of education as a primary client, a larger number of other "quasi-clients" must also be considered. The professional responsibility which the school attorney has toward the

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[17] C.P.R., EC 5-18. *Compare* R.P.C., Rule 1.13, which requires an attorney for an organization to "proceed as is reasonably necessary in the best interest of the organization." For a comprehensive review of the role of the lawyer for the organization, *see* Shipmin, "Professional Responsibilities of the Corporation Lawyer," in *Professional Responsibility*, 271-309 (1978).

[18] R.P.C., Rule 1.13.

[19] *E.g.*, Hazard, *Ethics and the Practice of Law*, 46-55 (1978).

[20] DR 4-101(B). *Compare*, R.P.C. Rules 1.6(a), 1.8(b).

[21] DR 4-101(A). *Compare*, R.P.C. Rule 1.6, which forbids an attorney from revealing "information relating to representation of a client."

board client must be tempered by the obligations owed the indviduals involved.[22]

Again, this is an area in which the attorney needs to clearly explain his or her relationship with members of the board of education and with administrators. It is particularly necessary when new board members are elected or appointed. The board members and administrators must clearly understand that the school attorney represents the entity or the organization. They must also understand that while any attorney takes seriously the requirement to keep the confidences and secrets of the individuals making up the organization, loyalty is owed primarily to the whole, not to its parts.[23] As long as the parties understand this, no question of a lack of loyalty should arise when the attorney is called upon to represent a point of view that is contrary to that of the previous majority.

JOINT REPRESENTATION OF THE DISTRICT: INDIVIDUAL BOARD MEMBERS AND DISTRICT EMPLOYEES

In personal injury cases as well as § 1983 civil rights suits, plaintiffs commonly sue not only the school district, but also the superintendent, the director of business operations, the principal, any involved teacher, the individual members of the board of education, and anyone else who may remotely be held liable. Confronted with this scattergun approach, the one school attorney will generally attempt to represent all of the individuals named as defendants. Though ideally, each individual should have his or her own attorney, in reality, if such were to be required, many of the individuals in question would go without any legal representation whatsoever.

In any such situation there is a definite potential for the interests of each of the individual defendants to conflict with one another.

Ethical Consideration 5-17:

> Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of an estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case.

Ethical Consideration 5-19:

> A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

Disciplinary Rule 5-105 specifically says that when a conflict exists, the lawyer may represent multiple clients if he can adequately represent the interests of

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[22] R.P.C. Rule 1.13(d): In dealing with an organization's directors, officers, employees, members or shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

[23] The only time the secrets or confidences of the quasi-client might have to be revealed to the primary client is when they clearly involve wrongdoing that is detrimental to the interest of the district, and the attorney cannot dissuade the individual from the action or persuade him to reveal it to the whole board. R.P.C., Rule 1.13(b).

each *and* if each consents after full disclosure. In addition, Model Rule 1.7(b)(2) requires that "[w]hen representation of multiple clients in a single matter is undertaken, the consultation [between the lawyer and each client] shall include [an] explanation of the common representation and the advantages and risks involved."

While court opinions do not provide much guidance in this area, one case is particularly helpful. *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*,[24] involving a somewhat analogous situation, concluded:

> Where it is not clear that a conflict of interest will occur between two or more clients of an attorney, the informed consent of the client or clients whose interests more likely would suffer in the event of conflict should develop can provide justification for the continuance of multiple representation.

In practical terms, this means that the school attorney who is representing both the district and individual employees should inform those employees of possible conflicts, because if a conflict did develop, the attorney would most likely continue to represent the ongoing client—the school district. In the event of a conflict, failure to inform the individual employees could result in the attorney having to withdraw completely from the case because of the potential problem with regard to confidential and secret communications from the former client.[25]

In *Upjohn Co. v. United States*,[26] the United States Supreme Court rejected the notion that in legal representation of an organization, the attorney-client privilege applied only to the "control group." *Upjohn* instead extended the privilege to any attorney-employee communication that provides relevant information needed by the attorney who must advise the client with respect to actual or potential problems.

In *Upjohn*, the general counsel was informed of payments which could have been considered bribes made to foreign government officials. After consulting the company president, he sent questionnaires to the IRS, which then demanded the questionnaires, related memoranda and notes of the interviews. The United States Supreme Court held that these communications were indeed privileged:

> In the case of the individual client, the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—"officers and agents . . responsible for directing [the company's] actions in response to legal advice"—who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.[27]

This decision brings within the bounds of the privilege, communications between a school attorney and school district employees that involve information required by the school attorney for purposes of advising the school district or

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[24] SEC File No. 3-4329 (Dec. 6, 1973).

[25] Yablonski v. United Mine Workers, 448 F.2d 1175 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

[26] 449 U.S. 383 (1981).

[27] *Id.* at 391.

the board of education. It may make it easier for the school attorney to elicit a free flow of information from lower-level employees within the school district if they can be assured that the information which is being supplied is covered by the attorney-client privilege. However, just who can assert the privilege is not clear. Unquestionably, the principal client, namely the board of education, can assert the privilege. But it is unlikely that individual employees can assert the privilege once the board has waived it.

The situation becomes somewhat difficult when the employee reveals some wrongdoing to the attorney. The attorney then has an obvious obligation of loyalty to reveal that information to his client, the board of education. Some writers have advocated that in a situation such as this, a "Miranda warning" should be given.[28] Certainly, the closer the working relationship between the employee in question and the attorney, and the greater the reliance of the employee, such as a superintendent or a top administrator, on the attorney, the more necessary it is for the attorney to inform the employee, before the incriminating information is communicated, that it may and indeed will be necessary for the attorney to reveal this information to the board.

The bottom line in this whole situation of the "quasi-client" is that legal representation of an organization creates responsibilities to individuals within that organization that may conflict with the obligation of loyalty owed the organization. There exists no easy, clear-cut solution for resolving the moral dilemmas that come with representation of an organization in which a variety of individuals with differing points of view will seek legal advice and give their confidences to the attorney. In the final analysis, the attorney, utilizing the directives and the specific considerations and rules laid down in the Code of Professional Responsibility and the Model Rules of Professional Conduct, must rely on his or her own moral sensitivities.

CONCLUSION

One of the criticisms of the present Code is that it is too vague and too general. As a learned, self-governing profession, lawyers cannot avoid the personal moral judgments that need to be made when confronted by issues of professional responsibility.

> The history of moral philosophy instructs unambiguously that whatever the value of the precept, rule or principle, in law and ethics the ordeal of judgment cannot be shirked. That choices are not neatly laid out *ab initio* does not mean that it cannot be delineated unambiguously with some sense and some clarity.[28]

The Preamble to the new Model Rules of Professional Conduct recognizes the need for personal judgment and clearly states that the Rules merely provide guidance.

> In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

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[28] Hazard, *Ethics and the Practice of Law* 51.

Before resolving any of the moral dilemmas that may arise in a particular situation, a school attorney must analyze and understand the possible roles and client relationships involved in that position. The attorney should clearly explain to the client what those roles are, the attorney's own perception of his or her proper functions, and the differences between the attorney's relationship to the "entity" and to the individuals who compose it.

APPENDIX A

Checklist and Policies for Selecting a School Attorney*

Richard A. Schwartz
Tharrington, Smith & Hargrove
Raleigh, North Carolina

ACCESSABILITY

Your attorney should be present at all board meetings.

Your attorney should be readily available as needed to consult with your administrators.

You should also select a firm which has knowledgeable and experienced back-up attorneys who are familiar with your school system and school law.

SUBSTANTIVE KNOWLEDGE

Your attorney should be knowledgeable and experienced in, and should be up-to-date regarding the following matters:

School board liability

School board insurance plans

Civil rights issues

Employee rights

EEOC matters

Student rights

Rights of handicapped students

Teacher and principal evaluation

Teacher and principal non-renewals

Teacher and principal dismissal cases

Teacher unions and collective bargaining (This is an item which will continue to become increasingly important in the next several years.)

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* These appendices were compiled from materials developed by David A. Splitt and Jonathan T. Howe for the National School Boards Association's American School Board Journal Seminar, July 1985, Montreal, Canada and from NSBA's Educational Policy Service.

Recent and pending changes in federal law

Matters affecting the schools at the federal level

Recent and pending changes in state law

Recent and pending changes in state board of education regulations

Open meeting law

Bidding requirements, procedures, and contracts

Legal rights of professional and non-professional personnel

School budgets and the state laws affecting school budgets and fiscal control

Documentation to protect the school system from potential litigation.

PROFESSIONAL ASSOCIATIONS

Your attorney should maintain active memberships in organizations designed to further the interests and goals of school boards and administrators with respect to the competent and efficient operation of the school system. The most important to these organizations are: your state Council of School Attorneys; the NSBA Council of School Attorneys; NOLPE; the Local Government Section of the American Bar Assocation; and the Education Law Committee of your state bar association.

Your attorney should obtain continuing legal education (CLE) on a regular basis to keep abreast of the latest developments in school law.

Your attorney should be active in his profession and viewed as a leader among his peers.

Your attorney should have some experience or contact with your state school boards association.

RESPONSIBILITIES

Your attorney should be available to represent your board of education and school district effectively at state and national conferences.

Your attorney should be able to advise the board and administration on needed policy changes before those policies present problems.

Your attorney should be familiar with and knowledgeable about practical, day-to-day problems faced by teachers and school administrators.

Your attorney should be able to provide in-service training and workshops to board members and school staff.

PRACTICAL SKILLS

Your attorney should have a broad legal background with knowledge and experience in the state and federal courts and should have familiarity with all court procedures and court officers.

Your attorney should be knowledgable and experienced in dealing with specialized documentation common to school systems in order to be able to protect the school system from potential liability and litigation.

NO CONFLICT OF INTERESTS

Your attorney should not represent any other governmental agencies at the local level which might pose potential conflicts of interest (particularly at budget time).

Your attorney should not be overly political or embroiled in local politics to the extent that groups or individuals might mistrust or fight the board because of the board's attorney.

APPENDIX B

Checklist for Finding a School Attorney

(1) WHAT EXPERIENCE DO YOU (OR YOUR LAW FIRM) HAVE IN THE SPECIALIZED AREAS OF SCHOOL LAW?

— Tort liability of local government entities and officials?
— Public Law 94-142 and §504 of the Rehabilitation Act?
— Civil rights actions and liability under 42 USC §1983?
— Employment contracts, collective bargaining, and adverse actions?
— Student rights, suspension and expulsion, and search and seizure?
— Constitutional issues such as due process and the First Amendment?

(2) ARE YOU A MEMBER OF THE FOLLOWING ORGANIZATIONS? FOR HOW LONG?

— Council of School Attorneys (NSBA)?
— National Organization on Legal Problems of Education (N.O.L.P.E.)?
— American Bar Association, Urban, State and Local Government Section, Public Educators Committee?

(3) HAVE YOU EARNED ANY C.E.U.'s IN SCHOOL LAW AREAS? HAVE YOU ATTENDED ANY SEMINARS OR WORKSHOPS ON SCHOOL LAW TOPICS?

(4) DO YOU REGULARLY SUBSCRIBE TO ANY OF THE FOLLOWING RESOURCE AND RESEARCH MATERIALS? ARE YOU FAMILIAR WITH THESE PUBLICATIONS?

— *Education Law Reporter* (West Publishing Co.)?
— *School Law News* (Capitol Publications, Inc.)?
— *American School Board Journal* (NSBA)?
— *The Executive Educator* (NSBA)?
— *Inquiry and Analysis* (NSBA Council of School Attorneys)?
— Any other publications related to school law and policy?

APPENDIX C

Sample Board Policy: Orange County, North Carolina

The Orange County School Board shall contract with a school attorney knowledgeable and experienced in school law. The Board will annually evaluate the performance of the Board attorney and shall retain the present attorney based on satisfactory performance.

In selecting an attorney, the School Board will consider the following criteria:

1. A working knowledge of school laws—local, state, and federal.
2. Have admission to the highest court in the state.
3. Have had actual experience in active trial work.
4. Certify that neither the attorney nor the attorney's firm discriminates according to race, religion, or sex in employment practices.
5. Be familiar with and have actual practice in appearing before administrative bureaus and agencies, both state and federal.
6. Be prepared to give priority attention to the Board's work.
7. Have a qualified replacement attend all duties of the School Board attorney during temporary absences.
8. Possess knowledge of contract, criminal, real estate, administrative law, civil rights, civil liberties, and labor laws.

The qualified attorney will be paid with school funds. Agreement as to duration of contract, fee or retainer will be made by the Board at the time of employment. The attorney of the Board will represent the school system and such school employees as the Board shall direct. The attorney shall advise the Board and Superintendent in all matters pertinent to the business of the school system.

APPENDIX D

Sample Letter Requesting Proposal for Legal Services

Dear Attorney:

The [name of school district] Board of Education seeks a law firm or attorney to serve in the capacity of School Board Attorney. The attorney designated by the retained firm to represent the Board of Education should be well versed in educational law, particularly with reference to federal and state statutory and case law governing public education in [state.] In addition, the attorney should be able to provide a broad range of legal services and prepare legal documents required by the Board and the Superintendent in the day-to-day operation of the [name of school district].

The attorney or firm representing the Board of Education will be expected to provide the following services:

Administrative Contact—Available for telephone and individual conferences with administrators, staff and board members as needed.

In-service Education—Prepare and present as requested in-service programs for administration, staff and board members on pertinent problem areas in school law, providing visual and or handout materials.

Informational System—Provide periodic updates on administrative practice and board policy, including the review of important court decisions and attorney general's opinions.

Policy Audit—Audit the policy handbook, administrative regulations and student and faculty personnel activities for the Board. Provide regular policy update recommendations and policy drafting services.

Special Opinions—Prepare legal opinions on education-related legal questions at the request of the Board and the Superintendent.

Legislative Services—Monitor and review changes in public school law enacted by the General Assembly and advise the Board and the Superintendent of legislative changes and necessary Board and administrative actions. In addition, provide a legislative drafting service for the Board.

Other Services—Attend board meetings as requested. Attend to other legal responsibilities and obligations of the Board of Education, such as real estate acquisitions, contracts and litigation.

Interested firms or attorneys should submit a firm resume and a proposal for provision of legal services, including a prospectus containing specific services proposed, to: [name and address of superintendent]. Since the Board would like to make a decision, in this matter as soon as possible, you are requested to submit your resume and proposal no later than _____ . For your information I have enclosed the current Board Policy on School Attorney. Any proposal should include documentation of the firm's ability to meet the standards set forth in the Policy.

Sincerely,

[Name]
Superintendent

cc: Board Members

APPENDIX E

Sample Policy: School Attorney

The Board recognizes that the increasing complexity of school district operations frequently requires the procurement of professional legal services. Consequently, it will retain an attorney or law firm for systematically securing such services.

The school attorney must be admitted to the state bar association and licensed. In addition, the attorney will either have supplementary training in school-related law and the roles of the public school in society, or will commit to acquiring such knowledge within a reasonable time following appointment.

Services will include, but not be limited to:

1. Furnishing general legal advice in policy development concerning Board relations with employees, employee organizations, pupils, parents, district residents, and other governmental and nongovernmental groups and agencies.
2. Aiding the well-being of the district.
3. Rendering services in impending or actual litigation involving the school system as a whole, or any unit, individual or groups of individuals connected with the schools.

A decision to seek legal advice or assistance in behalf of the district will normally be made by the superintendent or persons specifically authorized by the superintendent. Such action will be taken as it is consistent with approved district policy or standard practice and meets an obvious need of the district. It may also take place as a consequence of formal Board direction.

Many types of legal assistance to the district will be considered routine and not necessitating specific Board approval or prior note. However, when the administration concludes that an unusual type or amount of professional legal service may be required, the Board directs the administration to advise it expeditiously and to seek either initial or continuing authorization for such service.

Selection Procedures

The school attorney will be appointed or reappointed at the annual organizational meeting. In order to provide an opportunity for other district firms or attorneys to apply periodically for the position, the Board will adhere to the following selection procedures every three years beginning in 1975:

1. District law firms will be contacted by letter to determine interest in being considered.
2. A survey questionnaire will be sent to those firms who indicate an interest.

3. Firms expressing an interest will then be interviewed by the Board, after which one firm will be invited to become its legal counsel.

Selection Considerations

1. School system background and role experience of the attorney or law firm will be an important consideration. The Board expects to maintain a continuing relationship with an attorney or law firm, assuming performance is satisfactory.
2. The Board will expect the attorney to:
   a. Devote the time needed to keep up with school law, attend Board meetings when requested, and to respond promptly when legal assistance is requested by the Board or the administration.
   b. Participate in state and national organizations of school attorneys and attend meetings sponsored by other organizations, such as the state school boards association, state university, etc., that deal with school legal problems.
3. The fee schedule for the various types of services rendered (legal research, information, attendance at meetings, in court, etc.) will be established at the time of appointment or reappointment.

SOURCE: Independent School District 659, Northfield, Minnesota

DATE: Prior to 1981

DISTRICT SIZE: K-12, 2,974 students

From Educational Policies Services of the National School Boards Association.

APPENDIX F

Sample Policy: School Attorney

1. *FUNCTION*:

   The attorney for the Board of Education shall be retained as attorney for the school district and the Board and shall render services to the client, Board of Education of the City of Plainfield, as directed.

2. *DUTIES AND RESPONSIBILITIES: Included*

   a. Attend all regular, special and conference meetings of the Board of Education except when excused by the President.

   b. Attend meetings of committees of the Board of Education as requested by the President.

   c. Be responsible for and conduct the legal affairs of the Board and its committees.

   d. Advise the Board and Staff generally and give such written opinions as may, from time to time, be deemed necessary.

   e. Advise the Board, individual Board Members, Secretary of the Board, and Superintendent of Schools regarding school affairs.

   f. Advise the Board on all new decisions of the State Commissioner of Education or the courts where pertinent.

   g. Advise the Members of the Board of School Estimate when required.

   h. Advise the Board on the effects of decisions rendered by the State Board of Education.

   i. Prepare or review all contracts when necessary.

   j. Review and advise regarding notices and specifications for bidders when necessary.

   k. Prepare resolutions, deeds, leases, conveyances, bonds, obligations, and other legal instruments relating to the business of the Board as shall be required and conduct such correspondence in connection therewith as may be necessary to advance such matters or as may be requested by the Board.

   l. Prosecute, defend, or otherwise appear as counsel for the Board of Education in all actions which may be brought by or against it or any officer or employee thereof in his or her official capacity for or by reason of any

matter in which the Board is interested in any Court of the State, whenever requested by the Board.

m. Advise on acquisition of real estate and the examination of title thereto.

n. Prepare and review all school building contracts, performance bonds, maintenance bonds, and all other documents required to effectuate completion of said buildings and alterations pursuant to the appropriate statutes and laws of the State.

o. Represent the Board of Education in mediation, fact-finding, arbitration or court action pursuant to the State Employer-Employee Relations Act whenever requested by the Board.

p. Advise and review all matters regarding Planning Board and Zoning Board applications or proposals in the City which affect the operation of the school district.

q. Prepare and submit to the Board a report on the current status of matters being handled by the attorney's office for the District at least bi-annually or more frequently if the situation warrants.

DUTIES AND RESPONSIBILITIES: Excluded

a. Principal responsibility for labor negotiations with employee units except that the attorney may render such legal advice as deemed necessary by the staff primarily responsible.

b. The Board Attorney shall not represent any of the individual Board Members against the Board as a group or against any other individual Board Member.

3. *CONFLICT OF INTEREST*

The Board Attorney shall at all times treat all Board-related matters in the strictest confidence and shall not knowingly be placed in a position that may interfere with the full discharge of duties to this Board of Education. The Board Attorney shall not represent any current Board Member or current staff member to avoid a potential conflict of interest.

4. *COMPENSATION*

The compensation for the attorney shall be set forth from year to year and be the subject of a memorandum of agreement executed by the Board President at the direction of the Board and by the Board Attorney. Such fringe benefits as may be deemed appropriate by the Board shall be a part of such compensation. The Board Attorney shall be retained on an annual basis (July 1 to June 30) by resolution of the Board. Such a resolution shall require a roll call vote of the majority of the full board.

5. *PROFESSIONAL PREPARATION*

a. Must be an attorney-at-law licensed to practice in the State.

b. Must have experience as a trial and appellate attorney.

6. *EXPERIENCE BACKGROUND*

   a. Demonstrated ability and success in the field of school law and general administrative law.

   b. Demonstrated ability and success in the field of school employee-employer relations.

   c. Demonstrated ability and success in effective human relations skills.

7. *PERSONAL QUALIFICATIONS*

   a. Must be of the highest personal and professional integrity.

   b. Must possess the ability to relate to one's colleagues and the public in an articulate and dignified manner.

   c. Must possess vigorous leadership qualities.

SOURCE: Plainfield School District, Plainfield, New Jersey
DATE: 6/15/82
DISTRICT SIZE: PK-12

From Educational Policies Service of the National School Boards Association.

APPENDIX G

Sample Policy: School Attorney

Qualifications

a. The school attorney shall be a duly licensed attorney authorized to practice law in all of the courts of the State of Wisconsin and be a practicing lawyer in the City of Beloit.

Duties

Upon the request of the Board of Education, the Superintendent of Schools or other administrative officers, the school attorney shall perform the following duties:

a. Be the legal adviser for the Board of Education, the Superintendent of Schools, the Business Manager, and Director of the Department of Pupil Personnel on all matters pertaining to the administration of the school system.

b. Prepare or advise in the drafting of resolutions and rules for the Board of Education, and advise the Board on all matters pertaining to the functions of the Board of Education in the governing of the school system and in concert with the City Council of the City of Beloit.

c. Counsel the Superintendent of Schools, and other administrative personnel on the orders of the Superintendent, of all legal problems that arise as to school laws, actions concerning students and teachers in the system, and determination of tuition status of pupils, and represent the school system's interests in all legal matters that may come before the courts.

d. Draft all legal documents or advise on all legal documents that concern the Board of Education or the administration of the school system.

e. Examine all contracts and approve the same before any action is taken by the Board of Education or the Superintendent of Schools in the execution of the contracts.

f. Work closely with the architect who is engaged to perform architectural services for the Board of Education for the purpose of public construction pertaining to school property.

The school attorney shall approve all contract documents consisting of the advertisements for bids; instruction to bidders; bids; performance and payment bonds; the contract; change orders; supplemental conditions; and all other documents including addendum *before* the same are submitted to the public, the bidder, or the contracting party.

The school attorney shall insist that these conditions be incorporated in every contract entered into between the School Board and the architect and that the architect shall schedule his work to assure that these conditions are met.

SOURCE: Beloit Public Schools, Beloit, Wisconsin
DATE: 1966
DISTRICT SIZE: PK-12; 8,473 students

From Educational Policies Service of the National School Boards Association.

APPENDIX H

Job Description: School Attorney

The general responsibility of legal counsel is to render service on legal issues concerning governance, finance, property, pupils, employees, liability, and other legal concerns of the school district. Legal counsel shall represent the corporation in litigation and in arbitration proceedings between the corporation and its various collective bargaining units. Legal counsel shall be responsible for preparation of legal opinions and other legal documents, including pleadings, briefs, contracts, and leases. Legal counsel shall advise the board and staff regarding the impact of current federal and state legislation, and may assist with the planning for implementation of current legislation as it impacts on the school district. Legal counsel shall advise the board and staff regarding the impact of administrative and judicial decisions upon the school district. Legal counsel shall coordinate and assist with hearings before the board of education, including expulsion of students, nonrenewal and dismissal of district personnel, special education appeals, Title IX appeals, and student record appeals. Legal counsel shall advise administrative personnel in areas of legal concern in the day-to-day operation of the school district. Legal counsel shall assist the board of education in the conduct of meetings and may assist the secretary as parliamentarian at regular meetings of the board of education. Legal counsel shall perform such other duties as may be directed by the board or the superintendent.

The foregoing general description of responsibilities is not meant to be inclusive, and may be expanded by the board and superintendent from time to time in unforeseen circumstances.

APPENDIX I

Job Description: School Attorney

TITLE: School Attorney

QUALIFICATIONS:
1. *[Certificate, license, or other legal credential required.]*
2. *[Degree(s) required and area of major study.]*
3. *[Kind and amount of prior job experience required.]*
4. Such alternatives to the above qualifications as the Board may find appropriate and acceptable.

REPORTS TO: *[Person designated by the Board or the superintendent.]*

JOB GOAL: To provide direct, full-time professional legal counsel and representation for the superintendent, the staff and the Board on school district matters.

PERFORMANCE RESPONSIBILITIES:

1. Prepares and conducts litigation and administrative law hearings as directed by the superintendent and as authorized by the Board, including (but not limited to) the preparation of all pleadings and trial and appellate briefs, negotiation between parties and the conduct of trial and hearings at the level of original jurisdiction or on appeal, and all other court or hearing appearances in order to represent most effectively the interests of the school district as those interests are interpreted by the superintendent.
2. Prepares and renders legal opinions upon request to the superintendent, the staff and the Board (or any member thereof).
3. Attends and provides legal advice at all meetings of the Board and such other meetings as the superintendent may direct.
4. Prepares all documents incident to the noticing, calling and conducting of school tax rate increase elections and school bond elections.
5. Provides legal assistance in the drafting of legal documents, policies, rules and regulations, resolutions, ap-

plications, and all other legal or quasi-legal papers upon request.

6. Provides legal assistance in the drafting of state legislation proposed by the school district for presentation to the state legislature.
7. Maintains a current file of all legislation introduced in the state legislature and interprets the impact of such legislation on the interests of the school district.
8. Maintains files and supervises periodic revision of policies and rules and regulations promulgated by the Board or the superintendent.
9. Performs such other duties consistent with his professional competence as the Board may from time to time assign.

TERMS OF EMPLOYMENT: Twelve-month year, remuneration to be negotiated with the Board.

EVALUATION: Performance of this job will be evaluated annually by the superintendent and the Board.

Approved by:_____ Date:_____

Reviewed and agreed to by:_____ Date:_____
(Incumbent)

SOURCE: School Personnel Management System, NSBA

From Educational Policies Service of the National School Boards Association.

APPENDIX J

Sample Board Policy: Houston Independent School District Administrative Procedures

212.000 Coordination of Legal Services Within H.I.S.D.

Attorney employed by the Board of Education shall provide the legal services and counsel necessary for the successful operation of the Houston Independent School District. Non-legal services which do not require the expertise of an attorney shall be performed by the administration.

The delineation of administrative responsibilities in no way removes from the attorney the responsibility to advise the Board or the administration of significant changes in laws which affect the operation of the District. In the performance as legal counsel for the Houston Independent School District, the attorney for the Board shall receive referrals and requests only from the Board members, the General Superintendent, either of the Superintendents for Program Implementation and School Management or the Associate Superintendent for Board Services. Copies of all transactions shall be transmitted for filing in the Board Services office.

Effective coordination of the attorney's services to the District shall include assignment of non-legal duties in connection therewith to appropriate administrators. Designated responsibilities for coordination of services are described in the following sections. (3-11-78)

212.100 Attorney-Initiated Projects

The school attorneys are authorized to discuss school-related matters with attorneys of other school districts and to initiate minor inquiries on matters which come to their attention on a daily basis. The school attorneys are also authorized to respond to inquiries from governmental agencies and other attorneys. In all matters which will require a major expenditure of time, except in emergency situations, the attorneys will first obtain permission from the President of the Board, the General Superintendent, or the Associate Superintendent for Board Services. Such permission for attorney-initiated projects may be given either verbally or in writing, but when verbal permission is given a brief

followup written instrument shall be executed including statement of facts, the legal issues involved and implications for the District. This may be done by at least a partial check-off form. (3-11-78)

212.200 Elections

Inasmuch as most of the work involved in bond and trustee elections is routine in nature, this work shall be handled by the Controller and the Associate Superintendent for Board Services. Only legal questions arising out of elections that cannot be answered by the Secretary of State shall be referred to the attorney. (3-11-78)

212.300 Review of Proposed Policies and Administrative Procedures

When policies and procedures are developed in accordance with approved structure, copies shall be forwarded to the attorney for review as deemed necessary. Assistance in writing such policies and procedures shall be sought only when necessary to comply with technical regulations of the law. Submissions shall be made to the attorney sufficiently in advance to allow for adequate review before presentation to the Board. (3-11-78)

212.400 Development of Forms

When a department has a recurring legal problem of a routine nature, every effort shall be made to develop forms to handle the procedure. Requests for legal help in preparing such forms shall be made to the administrator in the department's chain of command who is authorized to contact attorney. (3-11-78)

212.500 Request for Legal Services

Requests for legal services shall be made to the administrator in the department's chain of command authorized to contact the attorney. After permission for contact is given, the form asking for legal advice and containing all the information requested will be routed through the Associate Superintendent for Board Services. In order to expedite the process, every effort will be made to develop the facts relative to each request as well as background information on the problem. A sample form is included at the conclusion of this section.

In cases of emergency, verbal approval may be given by those authorized to contact attorney. In such cases, however, the appropriate form will be filled out so that a continuing record of such requests may be consulted by future administrators for guidance. All such records of answered requests and legal opinions from attorneys shall be kept in the Board of Education office.

Requests by telephone for information that can be provided without research shall be recorded on a log by both the attorney and the employee making the call. A form shall be provided for this purpose.

Attorney for the District shall refuse to respond to any requests for legal opinions other than from the Board or the appropriate administrators. However, the school personnel are empowered to respond to requests for information by the school attorney on pending matters. The attorney

shall also refuse to respond to requests for legal information from school patrons, but will refer such requests to the appropriate administrators.

Upon receiving a written request from the District, the school attorney shall acknowledge that the request has been received, the attorney who is assigned to the project, and the approximate time which will be required for response.

Each month, the school attorney shall provide written summaries of current questions being undertaken for the District with the requestor of the opinion or advice listed. This summary, shall be presented to the General Superintendent and the Board President. If the need for opinion or advice on a particular subject is no longer needed or desired, the attorney can then be advised accordingly. (3-11-78)

Article Two-General Superintendent/HISD Administrative Management Procedures

Form for Requesting Legal Advice or Opinion

Form _____

REQUEST FOR LEGAL ADVICE OR OPINION
HOUSTON INDEPENDENT SCHOOL DISTRICT

Date_____

All information requested on this form must be supplied before the request will be approved and submitted to the school attorney. If the space is insufficient, please use attachments. After the form has been completed, please submit to the General Superintendent, the appropriate Superintendent for Program Implementation and School Management, or the Associate Superintendent for Board Services for approval. When such approval is secured, please then submit the report to the Associate Superintendent for Board Services, who will transmit it to the Board attorney after first checking to make certain all questions are answered.

a. The legal issue. Please fully but concisely state the legal issue to be resolved.

b. Statement of the facts. Please make a complete statement of the facts.

c. Applicable laws, regulations and court orders. Please list any laws, regulations and court orders which may apply to the issue.

d. Applicable Board Policies and Administrative Procedures. Please list any Board Policies or Administrative Procedures which may apply to the issue.

e. Specific board or administrative actions. Please list any specific board or administrative action which may apply to this issue and dates they occurred. Attach copies of these actions or summarize in sufficient detail to provide the necessary information.

f. Previous opinions of attorney received by school. Please obtain from the Board Services Offices any previous legal opinions rendered for the school district which bear on your legal problem, attach copy. If none are found, state none.

g. Date of response. If a response is necessary by a certain date, please specify.

_____
(Signature)

_____
(Title)

Question resolved by administrator making report _____

Question resolved by approving administrator _____

Approved by _____
(Signature)

_____
(Title)

_____
(Date)

Submitted to attorney on _____

Answer received _____ (attach copy of opinion)

4 copies:
Bracewell & Patterson
Associate Superintendent for Board Services
Administrator making request
Administrator approving request

212.600 Meeting with the Attorney

The Associate Superintendent for Board Services shall coordinate a regular monthly meeting between administrators and attorney. This meeting will be used as a focal point for all legal services. In regular attendance shall be the General Superintendent, the Superintendents for Program Implementation and School Management and Associate Superintendent for Board Services and those they designate. All legal problems (except those of emergency nature) will be discussed at this meeting and further contact with attorneys, if at all possible, shall be limited to telephone and mail, thus limiting time-consuming and unnecessary conferences. (3-11-78)

APPENDIX K

Procedures for Requesting Legal Services

Generally, requests for legal services shall be directed through the secretary of the board, the superintendent of schools, the director of personnel or the negotiations specialist, the assistant superintendents, the director of building, and tranportation, the director of minority affairs, the director of secondary education, the director of elementary education, or the director of pupil services. These people may periodically designate others to contact legal counsel for assistance. All administrators in the district may be authorized to contact legal counsel in the event of an emergency which requires legal assistance. Ordinarily, when a designee or someone other than the specifically-named individuals authorized to request legal services contacts legal counsel, legal counsel should communicate with one of the designated persons so that they are aware the request has been made.

APPENDIX L

Evaluation of the Districts' Legal Services

INTRODUCTION

The Legal Counsel is responsible for assisting the Board of Directors and the Administration in the legal performance of their duties.

The legal services for which Legal Counsel has responsibilities to provide are described in the Board-adopted evaluative criteria upon which performance is assessed. The assessment of performance based on adopted criteria establishes the extent to which Legal Counsel is achieving District expectations.

The District's Legal Counsel is responsible to the Board and the Superintendent. Effective use of legal counsel as part of the management team is the responsibility of administrators and board members. Legal Counsel has responsibility for preparing and rendering legal opinions at the request of the Superintendent, designated staff, the Board of Education, or a member of the Board of Education. While rendering advice and assessing the legality of alternatives, Legal Counsel will help the policy-making process by defining legal problems. It is the responsibility of the Administration to recommend, and the Board to establish, policies of the District.

GUIDELINES

1. Each Board Member will by , *date* complete the performance evaluation form, including evidence statements, and transmit the completed form to the Board Secretary. An evaluation will also be completed by the Superintendent's Office, based upon information provided by designated administrators.

2. The Board Secretary will compile a composite form of all Board members' written evaluations and will, by *date* provide each Board Member with both a copy of the Board's composite evaluation and a copy of the evaluation completed by the Superintendent's Office.

3. The Board, Superintendent, and the District's Chief Legal Counsel shall meet, prior to *date* of each year, to discuss the composite evaluation. The session may be closed if a proper request is made and a proper motion and vote authorizing a closed session is made.

4. The evaluation may include a discussion of expectations, strengths and weaknesses.

[NAME] SCHOOLS
District Legal Services
Performance Evaluation Form

Performance Areas I: Responsibilities

Criteria	Not Observed	Does Not Meet	Needs Improvement	Meets	Exceeds
		Frequently demonstrates inability to provide service.	Occasionally demonstrates inability to provide service.	Generally demonstrates ability to provide service.	Consistently demonstrates ability to provide service. Exhibits initiative by anticipating potential legal problems.
A. Provides service on legal issues:					
Governance	☐	☐	☐	☐	☐
Finance	☐	☐	☐	☐	☐
Property	☐	☐	☐	☐	☐
Pupils	☐	☐	☐	☐	☐
Employees	☐	☐	☐	☐	☐
Liability	☐	☐	☐	☐	☐
B. Represents the District in litigation and arbitration proceedings	☐	☐	☐	☐	☐
C. Prepares legal opinions and other legal documents in a timely manner:					
Pleadings	☐	☐	☐	☐	☐
Briefs	☐	☐	☐	☐	☐
Contracts	☐	☐	☐	☐	☐
Leases	☐	☐	☐	☐	☐
D. Advises the Board and staff regarding the impact of current federal and state legislation	☐	☐	☐	☐	☐
E. Assists with planning for implementation of current legislation as it impacts on the school district	☐	☐	☐	☐	☐

F. Advises the Board and staff regarding the impact of administrative judicial decisions upon the District	☐	☐	☐	☐	☐
G. Coordinates and assists with Hearings before the Board of Education					
Student expulsion	☐	☐	☐	☐	☐
Nonrenewal or dismissal of District personnel	☐	☐	☐	☐	☐
Special education appeals	☐	☐	☐	☐	☐
Title IX appeals	☐	☐	☐	☐	☐
Student record appeals	☐	☐	☐	☐	☐
H. Advises administrative personnel in areas of legal concern in the day-to-day operation of the District	☐	☐	☐	☐	☐
I. Performs such other duties as may be directed by the Board or Superintendent	☐	☐	☐	☐	☐

Performance Areas II: Relationships With The Board

Criteria	Not Observed	Does Not Meet	Needs Improvement	Meets	Exceeds
		Frequently demonstrates inability to relate with the board.	*Occasionally demonstrates inability to relate with the board.*	*Generally demonstrates ability to relate with the board.*	*Consistently demonstrates ability to relate with the board. Exhibits initiative in clarifying directives and expectations.*
A. Seeks and accepts constructive criticism of his/her work	☐	☐	☐	☐	☐
B. Supports Board policy and actions to the public and staff	☐	☐	☐	☐	☐
C. Maintains harmonious working relationship with the Board	☐	☐	☐	☐	☐
D. Remains impartial toward Board Members, according all equitable treatment	☐	☐	☐	☐	☐
E. Refrains from criticizing members of the Board	☐	☐	☐	☐	☐

F. Goes immediately and directly to the Board when he/she feels an honest, objective difference of opinion exists between him/er and any or all members of the Board, in an earnest effort to resolve such differences immediately	☐	☐	☐	☐	☐

Performance Areas III: Community Relationships

Criteria	Not Observed	Does Not Meet	Needs Improvement	Meets	Exceeds
		Frequently demonstrates inability to promote community relations.	*Occasionally demonstrates inability to promote community relations.*	*Generally demonstrates ability to promote community relations.*	*Consistently demonstrates ability to promote community relations. Exhibits leadership at local, state and national levels.*
A. Has respect and status in the community on the conduct of school matters	☐	☐	☐	☐	☐
B. Has friendly and cooperative relationships with the news media	☐	☐	☐	☐	☐

Personal Qualities

Criteria	Not Observed	Does Not Meet	Needs Improvement	Meets	Exceeds
		Frequently demonstrates inability to maintain appropriate personal qualities.	*Occasionally demonstrates inability to maintain appropriate personal qualities.*	*Generally demonstrates ability to maintain appropriate personal qualities.*	*Consistently demonstrates ability to maintain appropriate personal qualities. Commands respect at local, state and national levels.*
A. Maintains high standards of ethics, honesty, and integrity in all personal and professional matters	☐	☐	☐	☐	☐
B. Has respect and standing among professional colleagues	☐	☐	☐	☐	☐
C. Demonstrates ability to work well with individuals and groups	☐	☐	☐	☐	☐
D. Possesses and maintains the health and energy necessary to meet the responsibilities of the job	☐	☐	☐	☐	☐

E. Maintains poise and emotional stability in the full range of professional duties	☐	☐	☐	☐	☐
F. Is suitably attired and groomed	☐	☐	☐	☐	☐
G. Uses language effectively in dealing with staff members, the Board and the public	☐	☐	☐	☐	☐
H. Speaks well in front of groups, expressing ideas in a logical and forthright manner	☐	☐	☐	☐	☐
I. Thinks well on his/her feet when faced with an unexpected or disturbing turn of events	☐	☐	☐	☐	☐

Performance Evaluation Comments:

Objectives for Improving Performance:

Composite Performance Rating:

Does Not Meet **Needs Improvement** **Meets** **Exceeds**

Evaluator's Signature _____

Date _____

APPENDIX M

Legal Services Questionnaire

The following questions seek basic information about the basic structure of legal services in your school district. The answers will help define your individual needs with respect to legal services.

HOW ARE LEGAL SERVICES CURRENTLY PROVIDED TO YOUR SCHOOL DISTRICT?

Are you represented by a government official or officer, such as a State's Attorney, Corporation Counsel, or County Attorney?

Does your school district have a retainer agreement with a local law firm?

Does your school board have a full-time or part-time staff attorney?

Does the school district have a full-time staff attorney who reports to the Superintendent of Schools or other school official?

Do you retain a private attorney only in individual cases where a lawyer is needed (such as defending a lawsuit)?

WHO IS RESPONSIBLE FOR ARRANGING FOR LEGAL SERVICES?

Is the responsibility for obtaining legal advice delegated to the Superintendent?

Does the Board retain authority to deal with legal counsel?

Is the responsibility defined in state law or Board policy?

HOW DO YOU DEFINE SPECIFIC LEGAL ISSUES OR PROBLEMS?

Does the Board meet to define the problem?

Does the Superintendent formulate issues and make recommendations to the Board for seeking legal advice?

Does the Superintendent or Board president confer informally with the Board's (school district's) attorney?

Does your school district attorney attend board meetings and point out legal issues and potential legal problems?

Does your school district attorney meet regularly with the Superintendent and the administrative leadership to address legal issues and identify potential problems?

WHAT ROLE DOES YOUR SCHOOL ATTORNEY HAVE IN POLICY MAKING?

Does the school district attorney review all proposed Board policies?

Does the school district attorney review only certain proposed policies when the Board and Superintendent define a related legal issues?

Does the school attorney review policies only after they are adopted?

HOW DO YOU PAY FOR LEGAL SERVICES?

Do you have a full-time staff attorney (or attorneys) on salary?

Do you have a long-term retainer agreement with a local lawyer or law firm?

Do you have a "legal services" or "retainer" line item (other than staff salaries and benefits) in your annual budget?

Do you pay for all legal services "by the hour"? Do you pay different rates for different types of legal services?

HOW MUCH DO YOU PAY FOR LEGAL SERVICES?

What is the total amount paid annually to staff attorneys (house counsel)?

How much do you pay outside counsel annually?

How much is the basic retainer? What does the retainer fee cover?

How much has your school district spent on legal services over the past three (3) years? the past five (5) years?

HOW ARE LEGAL OPINIONS RENDERED TO YOUR SCHOOL DISTRICT?

Do you receive most of your legal advice by telephone or orally in meetings of the Board or school officials?

Does your school attorney provide written legal opinions on all legal issues?

Do you receive a written legal opinion when you specifically request it? Does it cost more to obtain the advice in writing?

Can any Board member request a legal opinion at any time or is some form of Board consent needed prior to individual members seeking legal advice?

HOW IS YOUR SCHOOL DISTRICT LAWYER SELECTED?

Does the Board vote annually (or periodically) to retain a specific lawyer or law firm?

Does the Board delegate obtaining legal services to the Superintendent?

Does your school district request and receive bids for legal services in the same manner as it contracts for other outside services?

Does the Board or Superintendent hire staff counsel through advertisement and application? Does the Board approve the appointment?

IN WHICH OF THE FOLLOWING SITUATIONS DOES YOUR SCHOOL DISTRICT USE A LAWYER?

When a lawsuit is filed against the school district?

When the school district is taking an adverse personnel action? Before the action is taken or after the notice is given?

When the school is negotiating a contract with an employee bargaining unit?

When the school district is negotiating for grant funds or is signing an agreement or assurances in connection with grant funds?

When your school district is challenged on the placement of a handicapped student?

When your school district is engaged in contract proceedings (bids, reviews, negotiations) for equipment, supplies, services?

When the Superintendent or Board becomes involved in a student diciplinary proceeding, such as a long-term suspension or expulsion?

Regular review of existing Board policies? Pre-adoption review of proposed new policies or amendments to existing policies?

Other matters on which you consult legal counsel. (Please list)

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